

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 IN TACOMA

4 MARIA VARNEY, Individually)
5 and as Personal)
6 Representative for the) No. CV18-5105RJB
7 Estate of DONALD VARNEY,)
8 Plaintiffs,)
9 v.)
10 AIR & LIQUID SYSTEMS)
11 CORPORATION, et al.,)
12 Defendants.)

13 EVIDENTIARY HEARING

14 April 16, 2019

15 BEFORE THE HONORABLE ROBERT J. BRYAN
16 UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES:

For the Plaintiffs:	Benjamin Adams Ethan A Horn DEAN OMAR BRANHAM
For the Defendant Air & Liquid Systems:	Kevin Craig GORDON REES SCULLY MANSUKHANI
For the Defendant Armstrong International:	Stephanie Ballard PREG O'DONNELL & GILLETT
For the Defendant Flowserve US:	Marc Carlton LEWIS BRISBOIS BISGAARD & SMITH
For Defendants Foster Wheeler & CBS:	Alice Serko TANENBAUM KEALE
For the Defendant IMO Industries:	Michael Ricketts GORDON THOMAS HONEYWELL
For Defendants Ingersoll-Rand & Velan Valve:	Kevin Craig GORDON REES SCULLY MANSUKHANI
For the Defendant John Crane:	Claire Weglarz Daira Waldenberg HAWKINS PARNELL & YOUNG
For the Defendant Parker-Hannifin:	Nicole MacKenzie WILLIAMS KASTNER & GIBBS
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19
20
21
22
23
24
25

EXHIBIT INDEX

EXHIBITS ADMITTED	PAGE
A-1	14
A-2	14
A-3 & A-4	15
A-5	15
A-6	15
A-8	16
A-9	17
A-10	17
A-11	18
A-12	18
20	19

09:33:51AM 1 THE COURT: Okay. First let me give you a report
09:34:00AM 2 as to my evening activities. I read last night the
09:34:11AM 3 deposition of Maria Varney and the deposition of
09:34:19AM 4 Dr. Sharma. I reviewed and read all of the exhibits that
09:34:35AM 5 were handed to me as admitted, including the declaration
09:34:43AM 6 of Mr. Varney, the declaration of Father Schimmel, the
09:34:52AM 7 declaration of Dr. Kercheval, and exhibits that contained
09:35:05AM 8 hospitalization records and nurses' notes. I think that's
09:35:11AM 9 everything I was supposed to read.

09:35:17AM 10 I guess, Mr. Adams, the ball is in your court, if
09:35:26AM 11 there is anything further.

09:35:29AM 12 MR. ADAMS: That was everything we submitted.
09:35:31AM 13 Thank you very much for taking a look at that. I think we
09:35:34AM 14 are in the defense case now. The plaintiffs have rested.

09:35:37AM 15 THE COURT: Okay. We will turn to the defendants.
09:35:42AM 16 Who's first?

09:35:44AM 17 MR. VEGA: Your Honor, this is Dennis Vega --

09:35:47AM 18 THE COURT: Are you first by agreement of all
09:35:49AM 19 concerned or are you just grabbing first?

09:35:52AM 20 MR. VEGA: I think it is by agreement by all.
09:35:56AM 21 Sorry, your Honor. Before we begin, since plaintiff has
09:36:01AM 22 rested --

09:36:03AM 23 MR. HORN: Go ahead. Once you are done, I can
09:36:06AM 24 speak.

09:36:08AM 25 MR. VEGA: I'm sorry. Go ahead.

09:36:10AM 1 MR. HORN: We are done with our case-in-chief.
09:36:13AM 2 Once you are done, I will add my two cents.

09:36:16AM 3 MR. VEGA: My colleague, Alice Serko, has an
09:36:19AM 4 application to make before we begin with our
09:36:23AM 5 case-in-chief.

09:36:28AM 6 MS. SERKO: Your Honor, good morning. Alice
09:36:31AM 7 Serko on behalf of Foster Wheeler.

09:36:34AM 8 Foster Wheeler respectfully renews the motion to
09:36:37AM 9 exclude the Varney declaration and the Maddox report based
09:36:41AM 10 thereon, and asks for a directed ruling in that regard.

09:36:44AM 11 Plaintiff, as the proponent of hearsay evidence,
09:36:48AM 12 bears the burden of proof at this evidentiary hearing, and
09:36:51AM 13 has failed to sustain that burden.

09:36:53AM 14 As the Court noted in the order setting this hearing,
09:36:57AM 15 the Court was interested in who prepared the document,
09:37:00AM 16 what circumstances it was prepared under, when, where, and
09:37:04AM 17 by whom. Plaintiff has failed to produce that evidence in
09:37:09AM 18 this case.

09:37:10AM 19 The Court spent the better part of the day -- the
09:37:13AM 20 entire day yesterday, as well as, apparently, your Honor's
09:37:16AM 21 time yesterday evening, reading transcripts all that
09:37:21AM 22 focused on Mr. Varney's competency to sign a document.
09:37:28AM 23 None of the evidence was offered as to who, where, when,
09:37:32AM 24 and how the Varney declaration was prepared.

09:37:35AM 25 So Foster Wheeler respectfully submits they have

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09:37:38AM 1 failed to sustain their burden to show that the hearsay
09:37:42AM 2 declaration meets an enumerated exception. For that, we
09:37:46AM 3 would ask for a directed ruling. Thank you.

09:37:49AM 4 THE COURT: Thank you. I take it you all join in
09:37:52AM 5 that motion? Any response?

09:37:55AM 6 MR. ADAMS: Just briefly, your Honor. We
09:38:04AM 7 presented evidence that Mr. Varney is unavailable, that
09:38:09AM 8 this is a civil case, that when he signed his name to the
09:38:12AM 9 document he made a written statement, the same written
09:38:16AM 10 statement that every person makes when they sign a
09:38:18AM 11 document and they state under penalty of perjury that they
09:38:22AM 12 are adopting the truth of the contents in that document.

09:38:25AM 13 His death was imminent. That's literally been
09:38:28AM 14 undisputed, except in opening statement when one of the
09:38:32AM 15 lawyers said his death was not imminent. There hasn't
09:38:35AM 16 been a single bit of evidence to dispute, let alone
09:38:41AM 17 contradict, the undeniable fact that Mr. Varney had lost
09:38:46AM 18 over 55 pounds. He was skin and bones.

09:38:50AM 19 He told his family members he knew he would never
09:38:53AM 20 leave the hospital. He knew he would not make the wedding
09:38:56AM 21 anniversary. He knew his death was imminent. He had been
09:39:00AM 22 told he had terminal cancer. He was sitting in a hospital
09:39:03AM 23 bed, and he was skin and bones, gasping for air. And they
09:39:08AM 24 would present to you, your Honor, that he didn't know he
09:39:12AM 25 was going to die. That's undisputed.

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09:39:14AM 1 The declaration is about the cause and circumstances
09:39:17AM 2 of his death. Mesothelioma is only caused by asbestos,
09:39:22AM 3 and the declaration is about his exposure to asbestos dust
09:39:27AM 4 that caused his disease.

09:39:28AM 5 So the five elements of ER 804(b)(2), the dying
09:39:33AM 6 declaration exception to the hearsay rule, have been
09:39:37AM 7 satisfied, exactly what this hearing is about.

09:39:46AM 8 The competency issue, there has been ample evidence
09:39:50AM 9 from, I think, eight or nine witnesses at this point that
09:39:58AM 10 Mr. Varney was competent.

09:40:01AM 11 We heard from the notary, who said he would never
09:40:03AM 12 notarize a document if the individual, the signer, was not
09:40:08AM 13 lucid. He said, "Absolutely not. I would never notarize
09:40:12AM 14 a document if the signer was not lucid."

09:40:15AM 15 There are two nurses in the medical records, Nurse
09:40:19AM 16 Kracke, Nurse Alexander. Every single nursing note on
09:40:25AM 17 February 7th, 2018, indicates Mr. Varney was lucid, his
09:40:30AM 18 mental status was coherent, he was with it, he was
09:40:33AM 19 oriented times four. There is not a single nursing
09:40:37AM 20 note -- The people who spent the most time with
09:40:39AM 21 Mr. Varney on February 7th, 2018, were the nurses. That
09:40:42AM 22 is undisputed. Every single nursing note says he was
09:40:45AM 23 coherent and he was mentally lucid.

09:40:50AM 24 We heard from Dr. Sharma, and the medical records
09:40:55AM 25 that Dr. Sharma was shown, which from my perspective is

09:41:00AM 1 the most important piece of evidence in the case, because
09:41:03AM 2 it was prepared long before there was any lawsuit by
09:41:06AM 3 people with no interest in the lawsuit, and Dr. Sharma,
09:41:11AM 4 after reviewing the nursing notes and reviewing his own
09:41:13AM 5 notes, where he said Dr. Varney's neurology was
09:41:19AM 6 appropriate, he was communicating, Dr. Sharma said based
09:41:24AM 7 on all of that I think he was alert and oriented when he
09:41:27AM 8 signed the declaration on February 7th.

09:41:30AM 9 We heard from Gloria Varney, who said he was lucid,
09:41:33AM 10 who said he read the document, and he signed, and he was
09:41:37AM 11 lucid.

09:41:39AM 12 We heard from Dawn Brown yesterday, who said her
09:41:41AM 13 father sat up in the bed, indicated he was coherent,
09:41:45AM 14 looked at the document, read the document, signed the
09:41:47AM 15 document.

09:41:47AM 16 And we heard from Father Schimmel, the priest who was
09:41:51AM 17 there witnessing, who said Mr. Varney sat up in bed, held
09:41:56AM 18 the document, looked at the document, appeared to
09:41:58AM 19 understand the document, acknowledged he knew what the
09:42:01AM 20 document was, and signed the document.

09:42:06AM 21 There is ample evidence here to get past a directed
09:42:09AM 22 verdict. Thank you, your Honor.

09:42:11AM 23 THE COURT: Thank you, Mr. Adams.

09:42:18AM 24 MS. SERKO: Your Honor, if I may respond? Your
09:42:27AM 25 Honor, the material elements of the dying declaration

09:42:31AM 1 exception to the hearsay rule have not been met. The two
09:42:34AM 2 elements are that it contains the statements of
09:42:38AM 3 Mr. Varney; and the second, his belief that death was
09:42:43AM 4 imminent, and that the cause and circumstances of his
09:42:47AM 5 death are discussed.

09:42:48AM 6 Just a signature at the bottom of a page, which
09:42:52AM 7 Mr. Parris said only means that Mr. Varney was Mr. Varney
09:42:56AM 8 on that date, does not ratify the document as his
09:43:02AM 9 statements. And we do not believe that that has been
09:43:04AM 10 established in this case.

09:43:06AM 11 Without knowing where, when, and how the document was
09:43:10AM 12 created, drafted, and produced, the Court does not have
09:43:15AM 13 sufficient evidence upon which it could determine the
09:43:17AM 14 document was an exception to the hearsay rule or a dying
09:43:21AM 15 declaration. Thank you.

09:43:26AM 16 THE COURT: There is always the question at this
09:43:31AM 17 point of whether the judge wants to weigh the evidence
09:43:41AM 18 before him and try and rule on that basis or whether it
09:43:47AM 19 makes more sense to proceed to try and get a full picture
09:43:53AM 20 with any additional evidence available. I think the
09:44:02AM 21 latter path is the more likely path to the right result.

09:44:15AM 22 With that in mind, the motion is denied, and we will
09:44:21AM 23 proceed with whatever evidence the defense wishes to
09:44:23AM 24 present.

09:44:28AM 25 MR. HORN: Good morning, your Honor. Ethan Horn

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09:44:32AM 1 on behalf of the Varney family. Before we get started
09:44:35AM 2 with Mr. Adams' testimony, I would like to file an oral
09:44:39AM 3 motion pursuant to RCW 5.60.060. I have a copy of the
09:44:46AM 4 statute, if you would like.

09:44:49AM 5 Our motion is to disqualify Mr. Adams from
09:44:52AM 6 testifying, and preclude defense counsel from examining
09:44:59AM 7 relating to any communication made by the Varneys to
09:45:04AM 8 Mr. Adams or any of his advice back to the family. That
09:45:07AM 9 is, like I said, pursuant to RCW 5.60.060.

09:45:13AM 10 THE COURT: Let me see the statute. I don't know
09:45:16AM 11 all of the law by memory. Part of the problem is they
09:45:25AM 12 keep passing new laws.

09:45:39AM 13 MR. HORN: Specifically sub (2), sub (a).

09:46:02AM 14 THE COURT: That's not new. I don't know if
09:46:12AM 15 Mr. Adams was your first witness or what here.

09:46:17AM 16 MR. VEGA: Your Honor, Dennis Vega, Foster
09:46:22AM 17 Wheeler again. At this point, and in light of your ruling
09:46:25AM 18 on the directed verdict application, we would like to
09:46:31AM 19 renew our application for the metadata.

09:46:37AM 20 The questions that you asked of Ms. Brown yesterday,
09:46:41AM 21 and that you relayed today in terms of when the document
09:46:45AM 22 was created, by whom the document was created, whether in
09:46:50AM 23 fact the document was edited, we will have all of that
09:46:54AM 24 information in the metadata. We can know exactly when the
09:46:58AM 25 document was opened, for how long it was opened. We will

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09:47:02AM 1 know the keystrokes that were made on the document. We
09:47:05AM 2 will have all of the information that your Honor needs to
09:47:08AM 3 decide this to determine in fact when this document was
09:47:11AM 4 created.

09:47:13AM 5 So we are renewing our request for the metadata so
09:47:16AM 6 that this way -- And just like you said, you would like
09:47:20AM 7 to have -- the latter path is the more likely path just to
09:47:25AM 8 make sure we are doing the right thing here. If we have
09:47:27AM 9 that metadata, we can absolutely determine everything you
09:47:30AM 10 need to know about this document and whether in fact it
09:47:33AM 11 was made on the deathbed or made months or weeks earlier.

09:47:40AM 12 THE COURT: I don't think the request is timely,
09:47:43AM 13 counsel. I am not going to rule on it at this point.
09:47:48AM 14 Let's proceed with what evidence we have here.

09:47:51AM 15 MR. VEGA: If I may just address that timeliness
09:47:54AM 16 issue. We made the application for that material as soon
09:48:01AM 17 as we received Father Schimmel's declaration, which we
09:48:07AM 18 received not more than a week ago.

09:48:11AM 19 When it was received, that's the first time that we
09:48:14AM 20 knew that in fact Father Schimmel was at the hospital the
09:48:19AM 21 day before it was actually signed. And he was there to
09:48:23AM 22 witness a notary, which did not happen. And that was the
09:48:26AM 23 first time that we knew about that.

09:48:28AM 24 It was the first time that we knew that Ms. Brown was
09:48:32AM 25 even in the room. And we made -- We got that on a

09:48:35AM 1 Thursday, and by Monday we had issued our subpoena. And
09:48:41AM 2 pursuant to Rule 45, we gave them reasonable notice under
09:48:45AM 3 the circumstances, because it was information we just
09:48:47AM 4 learned.

09:48:48AM 5 THE COURT: All right. Let's put it this way: I
09:48:51AM 6 am not going to rule on that motion at this time. Got it?
09:48:56AM 7 Let's proceed with any evidence that you wish to present.

09:49:03AM 8 MR. VEGA: Your Honor, in light of your not
09:49:07AM 9 ruling on that issue at this point in time, we are going
09:49:10AM 10 to move to introduce certain documents.

09:49:15AM 11 THE COURT: All right.

09:49:18AM 12 MS. SERKO: Your Honor, Foster Wheeler offers as
09:49:26AM 13 its first exhibit -- It is actually Docket 269-1. I have
09:49:32AM 14 copies for counsel. For the record, that is the redacted
09:49:54AM 15 excerpts from the records produced by plaintiff showing
09:49:56AM 16 Mr. Varney's signature.

09:50:00AM 17 Foster Wheeler's Exhibit 2, for the record --

09:50:03AM 18 THE COURT: Wait a minute. One at a time.

09:50:07AM 19 MS. SERKO: Exhibit 1 for Foster Wheeler.

09:50:21AM 20 THE CLERK: Let's do A for the defendants'
09:50:28AM 21 exhibits.

09:50:30AM 22 MS. SERKO: Exhibit A-2 --

09:50:33AM 23 THE COURT: Wait a minute. Is there a question
09:50:46AM 24 as to whether the signature on Exhibit 1, which is already
09:50:54AM 25 in evidence -- is there any question about whether that

09:51:01AM 1 was actually made by Mr. Varney? I did not understand
09:51:10AM 2 that was an issue.

09:51:12AM 3 MR. VEGA: Your Honor, it is just to show the
09:51:14AM 4 distinction, and also the deterioration in just the
09:51:23AM 5 penmanship.

09:51:30AM 6 THE COURT: Any objection to 1?

09:51:33AM 7 MR. ADAMS: No.

09:51:33AM 8 THE COURT: A-1 may be admitted.

09:51:37AM 9 (Exhibit No. A-1 admitted.)

09:51:37AM 10 MS. SERKO: Your Honor, Foster Wheeler offers
09:51:40AM 11 Exhibit A-2, the medical records of Donald Varney for
09:51:45AM 12 treatment, dates February 2nd, 2018, through February 8th,
09:51:50AM 13 2018, from the Abrazo Community Health Network. And we
09:51:55AM 14 have a copy for plaintiffs' counsel. I would also note
09:51:58AM 15 for the record they are Bates stamped ACHN000406 through
09:52:08AM 16 -0003607.

09:52:20AM 17 MR. ADAMS: Your Honor, we don't have any
09:52:21AM 18 objection to any medical records of Don Varney.

09:52:25AM 19 THE COURT: All right. A-2 may be admitted.

09:52:38AM 20 (Exhibit No. A-2 admitted.)

09:52:41AM 21 THE COURT: These are for purposes of this
09:52:43AM 22 hearing only.

09:52:45AM 23 MS. SERKO: Your Honor, as for Exhibit A-3, we
09:52:50AM 24 have additional medical records. And actually for A-4.
09:52:54AM 25 If plaintiff has no objection to Mr. Varney's records, I

09:52:57AM 1 would offer those together.

09:52:59AM 2 MR. ADAMS: No objection, your Honor.

09:53:00AM 3 THE COURT: All right. They may be admitted.

09:53:02AM 4 (Exhibit Nos. A-3 & A-4 admitted.)

09:53:17AM 5 MS. SERKO: Foster Wheeler offers as Exhibit A-5,
09:53:24AM 6 defendants' first set of interrogatories propounded to
09:53:28AM 7 plaintiffs and their answers thereto.

09:53:53AM 8 MR. ADAMS: Your Honor, for the purposes of this
09:53:55AM 9 hearing, we don't have an objection. But the usual
09:53:59AM 10 practice is that interrogatories are read into the record
09:54:04AM 11 but they are not admitted. But for purposes of this
09:54:08AM 12 hearing, it's fine.

09:54:09AM 13 THE COURT: All right. A-5 may be admitted.

09:54:17AM 14 (Exhibit No. A-5 admitted.)

09:54:17AM 15 MS. SERKO: Foster Wheeler offers as Exhibit A-6,
09:54:21AM 16 additional medical records of Donald Varney, ACH360
09:54:26AM 17 through -390.

09:54:32AM 18 MR. ADAMS: No objection.

09:54:33AM 19 THE COURT: All right. That may be admitted.

09:54:47AM 20 (Exhibit No. A-6 admitted.)

09:54:47AM 21 MS. SERKO: Foster Wheeler offers as Exhibit A-7
09:54:52AM 22 the NIH drug fact sheet from MedlinePlus regarding
09:55:02AM 23 Mr. Varney's medications at the time of February 7th.

09:55:34AM 24 MR. ADAMS: Your Honor, we would object to this
09:55:37AM 25 document. It's not page numbered, but it appears to be 25

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09:55:40AM 1 pages or so of something off the internet. There has been
09:55:43AM 2 no foundation, and it is hearsay without exception.

09:55:52AM 3 MS. SERKO: Your Honor, this document is a
09:55:54AM 4 reliable document. It meets the exception, because it is
09:55:57AM 5 a publication established as reliable evidence. And your
09:56:01AM 6 Honor may take judicial notice under 803(18)(b).

09:56:12AM 7 THE COURT: A-7 will be rejected. I think you're
09:56:18AM 8 gilding the lily to some extent, and I do not think it
09:56:24AM 9 would be helpful for me to spend time trying to analyze
09:56:29AM 10 the effects of all this medication on Mr. Varney. It's
09:56:46AM 11 too much. What's next?

09:56:55AM 12 MS. SERKO: Your Honor, Foster Wheeler offers as
09:56:57AM 13 Exhibit A-8, excerpts from plaintiffs' responses to
09:57:03AM 14 defendant CBS Corporation's first seven interrogatories
09:57:07AM 15 and requests for production to Maria Varney.

09:57:55AM 16 MR. ADAMS: No objection, your Honor, for
09:57:57AM 17 purposes of this hearing.

09:58:00AM 18 THE COURT: All right. A-8 may be admitted.

09:58:20AM 19 (Exhibit No. A-8 admitted.)

09:58:20AM 20 MS. SERKO: Your Honor, Foster Wheeler's final
09:58:22AM 21 exhibit is A-9. It is the declaration of Ben Adams, at
09:58:27AM 22 Docket 349, in response to declaration of Alice Serko
09:58:32AM 23 regarding subpoena to Dean Omar regarding the subpoena for
09:58:37AM 24 metadata. Your Honor, I'm sorry. Foster Wheeler offers
09:59:13AM 25 an additional exhibit.

09:59:14AM 1 THE COURT: Wait a minute. Let's deal with A-9.

09:59:34AM 2 MR. ADAMS: Your Honor, I'm not sure of the

09:59:36AM 3 relevance of my declaration. I don't think it is evidence

09:59:40AM 4 relevant to the case. Just for the record, we would

09:59:49AM 5 object on relevance grounds. That's it.

09:59:58AM 6 MS. SERKO: Your Honor, if I may respond?

10:00:00AM 7 THE COURT: Yeah, go ahead.

10:00:03AM 8 MS. SERKO: Your Honor, this is relevant to the

10:00:04AM 9 claims of privilege asserted, both in work product and

10:00:08AM 10 attorney-client privilege over the metadata and the

10:00:11AM 11 drafting of the documents. We believe it is directly

10:00:13AM 12 relevant to this hearing.

10:00:25AM 13 THE COURT: Well, I think it may be admitted.

10:00:33AM 14 It's part of the public record anyway in the file.

10:00:42AM 15 (Exhibit No. A-9 admitted.)

10:00:42AM 16 MS. SERKO: Your Honor, Foster Wheeler offers as

10:00:44AM 17 Exhibit A-10 the deposition of John Kercheval, the

10:00:51AM 18 designations and objections from plaintiff and from Foster

10:00:55AM 19 Wheeler.

10:00:55AM 20 MR. ADAMS: No objection, your Honor.

10:00:57AM 21 THE COURT: All right. It may be admitted.

10:00:59AM 22 (Exhibit No. A-10 admitted.)

10:01:30AM 23 MS. SERKO: Your Honor, we offer as Exhibit A-11

10:01:34AM 24 the complaint for personal injury filed by plaintiff --

10:01:38AM 25 plaintiffs Donald and Marie Varney, husband and wife, at

10:01:41AM 1 Case No. 2-17-CV-1902.

10:02:11AM 2 MR. ADAMS: No objection, your Honor, for
10:02:14AM 3 purposes of this hearing only.

10:02:19AM 4 THE COURT: Is this the original complaint that
10:02:26AM 5 started this case?

10:02:27AM 6 MS. SERKO: Yes, your Honor.

10:02:28AM 7 MR. ADAMS: Yes, your Honor.

10:02:32AM 8 THE COURT: A-11 may be admitted.

10:02:36AM 9 (Exhibit No. A-11 admitted.)

10:02:36AM 10 MS. SERKO: Your Honor, we would offer as
10:02:39AM 11 Exhibit A-12 email correspondence from plaintiffs'
10:02:44AM 12 counsel, dated February 1st, 2018, through February 7th,
10:02:55AM 13 2018, regarding Mr. Varney's condition and the deposition.

10:03:57AM 14 MR. ADAMS: No objection, your Honor. Although
10:03:59AM 15 we will have an offer of additional emails for
10:04:04AM 16 completeness once defense rests.

10:04:08AM 17 THE COURT: A-12 may be admitted.

10:04:24AM 18 (Exhibit No. A-12 admitted.)

10:04:24AM 19 MS. SERKO: We have no additional exhibits at
10:04:26AM 20 this time.

10:04:26AM 21 THE COURT: All right. I've got some reading to
10:04:35AM 22 do.

10:04:37AM 23 MS. WEGLARZ: Your Honor, on behalf of all
10:04:39AM 24 defendants, we adopt Foster Wheeler's evidence that it has
10:04:43AM 25 offered into the record.

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10:04:44AM 1 THE COURT: Right. Do you have a witness ready?

10:04:55AM 2 MR. VEGA: Your Honor, with that, Foster Wheeler

10:04:59AM 3 rests.

10:05:05AM 4 THE COURT: Do all defendants rest? Okay.

10:05:15AM 5 MR. ADAMS: Your Honor, we have one exhibit to

10:05:17AM 6 offer in rebuttal, if we may.

10:05:20AM 7 THE COURT: Okay.

10:05:22AM 8 MR. ADAMS: Plaintiffs offer as Exhibit 20 an

10:05:28AM 9 email chain from February 2nd, 2018, to February 5th,

10:05:36AM 10 2018, regarding Mr. Varney and his condition. And I have

10:05:39AM 11 a copy for counsel.

10:05:42AM 12 THE COURT: Any objection to 20?

10:05:45AM 13 MS. SERKO: I would just like to review it.

10:06:43AM 14 MR. ADAMS: Your Honor, I misspoke about the

10:06:44AM 15 dates on the document. For Exhibit 20, it is from

10:06:48AM 16 January 26th to February 5th, the email chain offered as

10:06:53AM 17 Exhibit 20.

10:06:55AM 18 MS. SERKO: There will be no objection.

10:06:57AM 19 THE COURT: All right. 20 may be admitted.

10:07:02AM 20 (Exhibit No. 20 admitted.)

10:07:02AM 21 THE COURT: Any further rebuttal?

10:07:06AM 22 MR. ADAMS: No, your Honor.

10:07:08AM 23 THE COURT: All right. Well, now I have to read

10:07:13AM 24 all this stuff. Come back at 1:30. We will see how fast

10:07:21AM 25 I can read. Okay? We will hear argument at 1:30.

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10:08:01AM 1 (Recessed.)

01:32:30PM 2 THE COURT: Okay. I have read all of the
01:32:33PM 3 exhibits filed -- admitted on behalf of the defendants.
01:32:41PM 4 And so I guess all of the evidence is in.

01:32:44PM 5 I wanted to say to you, I am mindful that I kind of
01:32:48PM 6 pushed you around a little bit in regard to objections
01:32:52PM 7 made and so forth. I'm anxious to get to the bottom line
01:33:02PM 8 in this matter. I think that we got everything in that we
01:33:09PM 9 are going to get. I'm sorry if you took offense at my
01:33:19PM 10 ignoring some of your objections.

01:33:22PM 11 Mr. Adams, I guess the floor is yours.

01:33:29PM 12 MR. ADAMS: Thank you, your Honor. Your Honor, I
01:33:43PM 13 would like to start -- I would like to end where we
01:33:47PM 14 started.

01:33:48PM 15 THE COURT: I'm sorry?

01:33:49PM 16 MR. ADAMS: I would like to end where we started,
01:33:51PM 17 and that's the bottom line in this matter. It's whether
01:33:57PM 18 or not Mr. Varney's declaration on February 7th, 2018, was
01:34:01PM 19 a dying declaration under ER 804(b)(2).

01:34:07PM 20 And there are five elements under 804(b)(2). The
01:34:11PM 21 first element is that the witness be unavailable. It's
01:34:16PM 22 completely undisputed that Mr. Varney is unavailable.

01:34:20PM 23 The second is that it be a civil case. Again,
01:34:24PM 24 undisputed this is a civil case.

01:34:27PM 25 Mr. Varney had to make a statement. And the evidence

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01:34:32PM 1 has been that Mr. Varney made the same statement that
01:34:35PM 2 every witness makes when they sign a document under
01:34:39PM 3 penalty of perjury and attest to the truth of the facts in
01:34:44PM 4 the document. He said he has read the foregoing,
01:34:48PM 5 understands it, and signed it under penalty of perjury.

01:34:52PM 6 ER 801, Evidence Rule 801, says nonverbal conduct
01:35:00PM 7 intended as an assertion is a statement. And so if the
01:35:04PM 8 only thing we had was Mr. Varney's signature on the
01:35:08PM 9 document, that would be nonverbal conduct that qualifies
01:35:13PM 10 as a statement.

01:35:14PM 11 But we also have the evidence from Dawn Brown and
01:35:18PM 12 from Father Schimmel that Mr. Varney stated he was
01:35:23PM 13 coherent and he understood what the document was.

01:35:31PM 14 You will recall in Father Schimmel's declaration he
01:35:34PM 15 indicates that Mr. Varney acknowledged he knew what the
01:35:37PM 16 document was, which is entirely consistent with the
01:35:40PM 17 testimony from Mrs. Brown in court that Mr. Varney made a
01:35:46PM 18 statement that he was coherent and he understood what the
01:35:49PM 19 document was.

01:35:51PM 20 And so we have both a nonverbal assertion, which
01:35:55PM 21 qualifies as a statement, and oral statements by
01:35:58PM 22 Mr. Varney that qualify as statements.

01:36:01PM 23 The fourth requirement of ER 804 is that the witness'
01:36:09PM 24 or the signer's death -- the declarant's death must be
01:36:14PM 25 imminent, and the declarant must believe his death is

01:36:17PM 1 imminent.

01:36:19PM 2 We know that the evidence, which was largely
01:36:22PM 3 undisputed, is that Mr. Varney must have known his death
01:36:27PM 4 was imminent. First of all, just the nature of the injury
01:36:31PM 5 that he had. He had lost over 55 pounds. The testimony
01:36:36PM 6 was that he was bones. And there was skin, but it was
01:36:44PM 7 barely -- skin and bones.

01:36:47PM 8 He had increasing pain. Dr. Kercheval stated in his
01:36:52PM 9 declaration that Mr. Varney's condition had decreased by
01:36:56PM 10 70 percent between his admission on January 26th and the
01:37:00PM 11 date of the declaration, February 7th. Someone who is
01:37:04PM 12 already extremely ill and extremely sick had decreased by
01:37:10PM 13 70 percent.

01:37:10PM 14 Dr. Kercheval said that Mr. Varney had days to live,
01:37:16PM 15 not weeks. Mr. Varney was having difficulty breathing,
01:37:22PM 16 and he was having all these different symptoms.

01:37:30PM 17 The defense would proffer to the Court that
01:37:32PM 18 Mr. Varney, with all these physical symptoms, and all this
01:37:35PM 19 pain he was going through, and all these things that were
01:37:38PM 20 happening to him, did not consciously understand he was
01:37:42PM 21 near death.

01:37:43PM 22 The testimony is also that Mr. Varney knew there was
01:37:47PM 23 no cure to his mesothelioma. He knew it was incurable.
01:37:52PM 24 That was the testimony from the family members. He knew
01:37:57PM 25 there was no cure.

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01:37:58PM 1 Mr. Varney knew and told his daughter he wouldn't
01:38:05PM 2 make Gloria and his wedding anniversary from the date in
01:38:10PM 3 Mexico, which was February 25th, 2018. The testimony was
01:38:14PM 4 that he bought a gift for Gloria for the earlier
01:38:18PM 5 anniversary because he knew he wouldn't be around for the
01:38:21PM 6 second anniversary at the end of February.

01:38:24PM 7 Dr. Kercheval's declaration -- By the way,
01:38:31PM 8 Dr. Kercheval is the basis of basically the entire
01:38:34PM 9 defense. The defense rests most of their case on
01:38:38PM 10 Dr. Kercheval. He is their guy. And Dr. Kercheval said
01:38:44PM 11 that death is imminent. Under penalty of perjury on
01:38:47PM 12 February 7th, 2018, Dr. Kercheval, the treating physician,
01:38:51PM 13 said that death is imminent.

01:38:52PM 14 And, of course, there was the priest there to give
01:38:56PM 15 Mr. Varney his last rites, and the sacrament and the
01:39:02PM 16 anointings, which in Catholicism mean the person is about
01:39:08PM 17 to die.

01:39:12PM 18 Mr. Varney said in his declaration, "I have no hope
01:39:17PM 19 or expectation of recovery from this terminal disease and
01:39:20PM 20 my death is imminent."

01:39:22PM 21 But most importantly, Mr. Varney died the next day.
01:39:26PM 22 So any debate about whether his death was imminent or not,
01:39:31PM 23 or he could have known, or the circumstantial evidence
01:39:36PM 24 shown -- showed that it was imminent and he knew, was
01:39:39PM 25 resolved when he passed away the very next day.

01:39:42PM 1 So while I think there may be some dispute, based on
01:39:46PM 2 the opening statements, about whether or not this fourth
01:39:48PM 3 element of ER 804 was satisfied, from the plaintiffs'
01:39:54PM 4 perspective the evidence is overwhelming.

01:39:56PM 5 The last element, Element 5 of ER 804(b)(2), is that
01:40:02PM 6 the content of the declaration must be about the cause and
01:40:05PM 7 circumstances of the witness' death.

01:40:09PM 8 Here we had undisputed testimony from Dr. Sharma,
01:40:14PM 9 undisputed testimony from Dr. Kercheval that mesothelioma
01:40:19PM 10 is a sigmoid tumor and is caused by asbestos.

01:40:24PM 11 And the medical records going back nearly a year from
01:40:28PM 12 Mr. Varney's death repeatedly reference asbestos exposure
01:40:34PM 13 in the Navy, asbestos exposure in the shipyard. Over and
01:40:37PM 14 over and over in the medical records regarding
01:40:41PM 15 Mr. Varney's illness of mesothelioma there is reference to
01:40:43PM 16 asbestos.

01:40:46PM 17 In his declaration Mr. Varney said, "Here is how I
01:40:50PM 18 was exposed to asbestos. Here is where I was exposed to
01:40:53PM 19 asbestos. Here are the products I worked with that
01:40:56PM 20 exposed me to asbestos."

01:40:58PM 21 And I didn't see any evidence to dispute any of that,
01:41:06PM 22 as far as the content of the declaration, whether it was
01:41:10PM 23 about the cause and circumstances of his illness and
01:41:14PM 24 death.

01:41:14PM 25 And so the evidence has shown that we have met all

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01:41:22PM 1 five elements of the dying declaration statute.

01:41:26PM 2 And so the question becomes, what is the defense?
01:41:33PM 3 What is the position that the defendants have presented to
01:41:39PM 4 the Court? And I would submit to the Court that the
01:41:43PM 5 defense has sort of been a throw-anything-at-the-wall
01:41:47PM 6 defense and see if it sticks.

01:41:49PM 7 The first defense was truly, your Honor, an argument
01:41:57PM 8 only a lawyer could make. It was that Mr. Varney's
01:42:02PM 9 declaration was too consistent with other evidence.
01:42:08PM 10 Consistency was presented to the Court as a weakness in
01:42:11PM 11 plaintiffs' case, in that the products in Mr. Varney's
01:42:17PM 12 declaration were the same products in his sworn responses
01:42:20PM 13 to written interrogatories, that the statements in the
01:42:24PM 14 declaration were consistent with the statements in the
01:42:26PM 15 complaint, that the statements in the declaration were
01:42:28PM 16 consistent with the statements made in the medical
01:42:30PM 17 records, that the statements in the declaration were
01:42:32PM 18 consistent with the statements Mr. Varney made to his
01:42:36PM 19 family, and that consistency somehow was a weakness in
01:42:41PM 20 plaintiffs' case.

01:42:44PM 21 But, your Honor, can you imagine if there was an
01:42:47PM 22 inconsistency in the declaration, if there was an
01:42:51PM 23 inconsistency in the declaration and the sworn
01:42:54PM 24 interrogatories or the medical records or what the family
01:42:57PM 25 said? What would the defense present to the Court if

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01:43:01PM 1 there was an inconsistency?

01:43:06PM 2 These sorts of arguments, where heads we win, tails
01:43:10PM 3 you lose, should be rejected by the court.

01:43:14PM 4 In any event, there is nothing about consistency in
01:43:17PM 5 ER 804(b)(2).

01:43:20PM 6 There was then an argument presented to the Court
01:43:23PM 7 about the spontaneity of the declaration, and that
01:43:28PM 8 Mr. Varney had made these same statements in medical
01:43:31PM 9 records and to his family long before he was sick.

01:43:35PM 10 Spontaneity is nowhere to be found in ER 804(b)(2).
01:43:40PM 11 It is simply not an element of that exception to the
01:43:43PM 12 hearsay rule.

01:43:45PM 13 Spontaneity is, however, an element of ER 803(2), the
01:43:50PM 14 excited utterance exception to the hearsay rule, which has
01:43:54PM 15 nothing to do with the proceeding that we are here on.
01:43:59PM 16 Spontaneity is specifically referenced as a key factor in
01:44:03PM 17 that exception.

01:44:04PM 18 So either the defense was confused about which
01:44:09PM 19 section we were here for or it was just a red herring.

01:44:17PM 20 There were arguments made about the policy
01:44:24PM 21 justifications for the dying declaration exception to the
01:44:30PM 22 hearsay rule. I think Ms. Weglarz, John Crane's lawyer,
01:44:37PM 23 made a fairly strong argument about the policy
01:44:41PM 24 justifications behind the dying declaration, that when a
01:44:47PM 25 person is at the end of their life and they are going to

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01:44:49PM 1 meet their maker, their only real motive is to tell the
01:44:54PM 2 truth. That's why we have the dying declaration
01:44:57PM 3 exception.

01:44:58PM 4 But we also heard that Mr. Varney was a religious
01:45:02PM 5 man, that he had a priest come to give him the last rites
01:45:06PM 6 and the sacred anointments. The defense would have the
01:45:14PM 7 Court believe that Mr. Varney as his last act as a
01:45:19PM 8 religious man told a lie. I think the Court should give
01:45:28PM 9 very little weight to an argument that what Mr. Varney did
01:45:31PM 10 did not fit squarely into the policy justifications behind
01:45:36PM 11 the dying declaration exception.

01:45:38PM 12 Then there were all the arguments, which was a large
01:45:46PM 13 part of the defense, about the credibility of the
01:45:49PM 14 witnesses and the credibility of the evidence. There were
01:45:55PM 15 the arguments that there was legalese in the declaration,
01:46:00PM 16 and so the declaration itself was not credible, that the
01:46:03PM 17 lawyers, quote, fabricated the declaration, and that what
01:46:06PM 18 the lawyers did was not credible, and that it was a,
01:46:09PM 19 quote, cut and paste from the complaint and from the
01:46:12PM 20 interrogatories and it wasn't credible.

01:46:16PM 21 There was testimony that I gave the notary a \$100
01:46:20PM 22 bill. It was designated by the defense. It was proffered
01:46:23PM 23 by the defense to the Court.

01:46:26PM 24 There was evidence that the priest had some relation
01:46:30PM 25 to the family ahead of time and therefore what he said

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01:46:33PM 1 should not be given as significant weight as if he had no
01:46:39PM 2 connection to the family.

01:46:41PM 3 There was a statement that the nursing notes were
01:46:43PM 4 automated, and so maybe the nurses just forgot to change
01:46:47PM 5 the automated entries in the nursing notes that uniformly
01:46:52PM 6 state Mr. Varney was alert and his mental status was
01:46:55PM 7 coherent.

01:46:57PM 8 There was the argument made during the
01:46:59PM 9 cross-examination of Mrs. Brown that she had a financial
01:47:02PM 10 interest in the lawsuit.

01:47:05PM 11 These arguments, whatever their weight, whatever
01:47:11PM 12 their legitimacy, go to the weight of the evidence, and
01:47:15PM 13 therefore the trier of fact. As the Court knows, it is
01:47:21PM 14 the exclusive province of the jury to assess the
01:47:25PM 15 credibility of witnesses and the weight of the evidence.

01:47:29PM 16 Also, not a single one of those is in ER 804(b)(2).

01:47:37PM 17 There were a number of statements in opening about
01:47:39PM 18 what the evidence would show, and they never came in.
01:47:44PM 19 There was a statement in opening that Mr. Varney had
01:47:47PM 20 dizziness. We never saw it. There was a statement in
01:47:51PM 21 opening that Mr. Varney had blurred vision. We never saw
01:47:54PM 22 it. And there was a statement that I already covered,
01:47:58PM 23 that Mr. Varney's death was not imminent.

01:48:03PM 24 And so there is a tension, I would argue to the
01:48:06PM 25 Court, in the defense position. The position is that

01:48:13PM 1 Mr. Varney was not sick enough to know his death was
01:48:16PM 2 imminent, while at the same time he was too sick and too
01:48:21PM 3 nonresponsive to have signed the declaration. And we
01:48:25PM 4 would submit to the Court that it is one or the other, but
01:48:27PM 5 not both. And the defense has proffered both.

01:48:30PM 6 We would submit to the Court that it is neither. But
01:48:33PM 7 to say that it is both is inconsistent.

01:48:36PM 8 There was the argument that this was a, quote,
01:48:41PM 9 theatrical production, completely staged. There was even
01:48:46PM 10 a priest there, your Honor, was the argument. "There was
01:48:49PM 11 even a priest. This was completely staged and
01:48:54PM 12 theatrical."

01:48:54PM 13 And, your Honor, it is true we brought a priest, we
01:48:58PM 14 brought a notary, we brought the family. Can you imagine
01:49:03PM 15 the argument if we hadn't, if Mr. Adams had snuck into the
01:49:09PM 16 room with no witnesses, presented the declaration to
01:49:13PM 17 Mr. Varney, had him sign it, left, and no one else had
01:49:17PM 18 seen it? Can you imagine the argument that would have
01:49:21PM 19 been made by defense?

01:49:24PM 20 With the same breath the defense presented to the
01:49:27PM 21 Court the argument that it wasn't theatrical enough, it
01:49:34PM 22 wasn't staged enough, because plaintiffs didn't bring a
01:49:39PM 23 cameraman and didn't film it on their cameras. And so the
01:49:45PM 24 defense, again, has presented these
01:49:49PM 25 heads-we-win-tails-you-lose arguments, that it wasn't

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01:49:52PM 1 theatrical enough, and it was too theatrical and staged,
01:49:58PM 2 and the Court should give those types of arguments very
01:50:00PM 3 little weight. None of them are in ER 804(b)(2) either.

01:50:05PM 4 And so the evidence has shown that there really is
01:50:15PM 5 only one defense, one legitimate -- one real defense
01:50:18PM 6 presented by the defense. And that's that Mr. Varney was
01:50:23PM 7 not competent to sign the declaration. That's the real
01:50:28PM 8 defense.

01:50:30PM 9 The problem with that defense is that every single
01:50:36PM 10 person in the room when Mr. Varney signed the declaration
01:50:42PM 11 says that defense is wrong, and says he was --

01:50:45PM 12 THE COURT: Except you.

01:50:48PM 13 MR. ADAMS: I was here. I was here. I was ready
01:50:52PM 14 to take the stand, and the defense chose not to call me.
01:50:59PM 15 I understand I could have put myself on the stand in my
01:51:02PM 16 own case. I understand that, your Honor. I was here. I
01:51:04PM 17 also could have not shown up and had another lawyer come
01:51:07PM 18 in my place and made them subpoena me.

01:51:11PM 19 They never subpoenaed me, your Honor. I showed up
01:51:13PM 20 voluntarily, and I am here, and I was here on the date
01:51:15PM 21 they said they would put me on the stand. And so I think
01:51:18PM 22 the only inference from that the Court can draw is that my
01:51:22PM 23 testimony would have been consistent with the other people
01:51:25PM 24 in the room.

01:51:27PM 25 All of these people have to have been wrong for the

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01:51:35PM 1 defense to be accurate, including -- Let me take a step
01:51:46PM 2 back. The defense is that Mr. Varney was unable to
01:51:50PM 3 respond. That's the defense. He was unable to respond,
01:51:57PM 4 he was obtunded and he was unable to respond, and
01:52:01PM 5 therefore the declaration lacks any indicia of reliability
01:52:07PM 6 and it should not be let in under any hearsay exception,
01:52:12PM 7 including the dying declaration. That's my understanding
01:52:14PM 8 of what the defense is.

01:52:15PM 9 But the notary, Mr. Parris, said he would absolutely
01:52:19PM 10 not ever notarize a document if the witness -- if the
01:52:24PM 11 signer was unable to respond. Because if you are unable
01:52:27PM 12 to respond, he said, I don't know if they are lucid or
01:52:32PM 13 not.

01:52:33PM 14 Nurse Kracke, who was one of the nurses repeatedly
01:52:40PM 15 referenced in the nursing notes, made this entry on
01:52:43PM 16 February 7th, 2018, about Mr. Varney, his level of
01:52:49PM 17 consciousness was alert. His mental status, the very
01:52:55PM 18 issue in this case, his mental status, "Alert. Oriented
01:53:01PM 19 times four."

01:53:02PM 20 Your Honor, if this was all we had -- This is
01:53:05PM 21 created by someone who has zero interest in this lawsuit.
01:53:09PM 22 Zero. And she says Mr. Varney's mental status on
01:53:17PM 23 February 7th, 2018, was alert and oriented.

01:53:19PM 24 His thought process, what was going on in his head,
01:53:24PM 25 the very issue here, was coherent on February 7th, 2018.

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01:53:31PM 1 They haven't brought a single document to dispute
01:53:35PM 2 this.

01:53:37PM 3 Then we had the second nurse, Nurse Alexander. Nurse
01:53:42PM 4 Alexander, again, on February 7th, 2017 (sic), Mr. Varney,
01:53:47PM 5 when asked about his urinary issues, denied problems to
01:53:51PM 6 the nurse. This was at 6:38 p.m., long after he signed
01:53:55PM 7 the declaration, but as his condition was deteriorating.
01:54:01PM 8 He was still denying problems to a separate, completely
01:54:04PM 9 independent nurse, which required communication.

01:54:08PM 10 We heard from Dr. Sharma. And he testified about
01:54:15PM 11 these nursing notes and what they meant. He said he
01:54:18PM 12 heavily relied on them as a doctor. He said that for
01:54:23PM 13 these entries in which Mr. Varney denies problems, he must
01:54:29PM 14 have communicated this, the nurse must have asked him the
01:54:33PM 15 question, and he understood the question and he answered
01:54:38PM 16 it appropriately the way he felt. And so when there is a
01:54:43PM 17 nursing note saying the patient is denying problems,
01:54:47PM 18 Dr. Sharma says there is a communication the patient
01:54:50PM 19 understands, and the patient answers appropriately.

01:54:53PM 20 Dr. Sharma also said, based on all of these nursing
01:54:57PM 21 records that he reviewed at his deposition, that when I
01:55:02PM 22 asked him the question, "Can you tell us whether or not
01:55:05PM 23 Mr. Varney would have been alert enough to understand this
01:55:08PM 24 document, the declaration that he signed," Dr. Sharma
01:55:12PM 25 said, "Based on the records which have been presented, I

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01:55:15PM 1 think he was alert and oriented." That's a question about
01:55:22PM 2 Mr. Varney signing the document, that his treating
01:55:26PM 3 physician says when he did that he was alert and oriented
01:55:30PM 4 based on these records.

01:55:32PM 5 And then we have Mr. Varney's wife, Gloria, who said,
01:55:38PM 6 "He knew he had to sign that paper. If not, he would not
01:55:41PM 7 leave comfortably. I don't know how, but at that moment
01:55:45PM 8 he was lucid. He was lucid and he signed."

01:55:49PM 9 Mr. Varney himself signed the document. That's his
01:55:53PM 10 signature on the document. And so Mr. Varney committed an
01:56:00PM 11 act on the document, signing it in the right place with
01:56:03PM 12 his signature.

01:56:04PM 13 Mr. Varney's daughter came and testified, Marie (sic)
01:56:09PM 14 Brown. She said about Don Varney, that when he was
01:56:14PM 15 presented with the document he sat up in bed, he said,
01:56:17PM 16 "I'm coherent" and "I know what I'm doing."

01:56:19PM 17 And finally, Father Schimmel, the priest who was in
01:56:23PM 18 the room at the time of the signing, said, "Mr. Varney was
01:56:27PM 19 handed the attached document and a pen. Although he was
01:56:30PM 20 very sick, I was impressed that he sat up to sign the
01:56:33PM 21 document rather than stay lying in the bed and make a
01:56:36PM 22 scribble signature, lying down, that I have seen other
01:56:39PM 23 patients make when in hospital. He opened his eyes, held
01:56:42PM 24 the document, responded positively that he knew what he
01:56:45PM 25 was signing, and he signed it. He appeared to understand

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01:56:48PM 1 the document." And that was signed by Father Schimmel.

01:56:54PM 2 And, your Honor, you also heard that the defense
01:56:57PM 3 called Father Schimmel on the phone. One of the defense
01:57:01PM 4 lawyers called Father Schimmel on the phone before I spoke
01:57:05PM 5 to him and obtained this declaration.

01:57:10PM 6 And so to the extent the Court will charge a party
01:57:18PM 7 with not having had a witness here live, or weigh that as
01:57:26PM 8 a strike against one of the parties, I would submit to the
01:57:30PM 9 Court that we got a declaration from Father Schimmel, the
01:57:35PM 10 defense contacted him, and the defense did not present any
01:57:38PM 11 evidence, subpoena Father Schimmel or bring him live. So
01:57:42PM 12 at least we brought something under oath signed by Father
01:57:47PM 13 Schimmel for the Court to consider.

01:57:48PM 14 If the defense theory of the case were true -- We
01:57:56PM 15 have come to the Court, we have presented each of our
01:57:58PM 16 competing theories of the case of what happened. If the
01:58:02PM 17 defense theory is correct, what else has to be true?
01:58:07PM 18 Every single one of those witnesses has to have gotten it
01:58:11PM 19 wrong, every single one of those medical records has to be
01:58:14PM 20 wrong. And so, your Honor, what are the odds that they
01:58:19PM 21 are all wrong?

01:58:22PM 22 And if the defense theory is true, and Mr. Varney was
01:58:32PM 23 unable to respond, and all of these witnesses who have no
01:58:37PM 24 interest in the case whatsoever, the nurses, the notary,
01:58:42PM 25 the priest, and the doctor, are wrong, who signed the

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01:58:45PM 1 document?

01:58:49PM 2 If Mr. Varney was unable to respond, how is his
01:58:53PM 3 signature on the document? For the defense position to be
01:59:00PM 4 true, someone had to have guided his hand, signed for him,
01:59:07PM 5 or somehow otherwise got someone's signature on a document
01:59:13PM 6 who could not respond. There would have to be something
01:59:20PM 7 nefarious with the signature to have happened in the
01:59:24PM 8 presence of all nine of those people. And they all said
01:59:28PM 9 the exact opposite. That's the logical sequence of
01:59:37PM 10 inferences from the defense theory of the case. It is
01:59:40PM 11 just not believable, your Honor.

01:59:41PM 12 I want to end with some case law. The defense put up
01:59:46PM 13 a bunch of case law in their opening statements. I didn't
01:59:49PM 14 do that, because I tried to predict what the evidence
01:59:52PM 15 would be and not make argument. But there are a number of
01:59:57PM 16 cases that I would just like to reference quickly. The
02:00:00PM 17 first case is Pisano versus Alfa Laval. This was a
02:00:04PM 18 case --

02:00:06PM 19 MS. WEGLARZ: Your Honor, I am going to object.
02:00:09PM 20 This is not even precedent. This is an unpublished case.

21 MR. ADAMS: She's next. She can make any
02:00:20PM 22 argument --

02:00:20PM 23 THE COURT: That doesn't mean you can't refer to
02:00:22PM 24 it.

02:00:23PM 25 MS. WEGLARZ: I think there are rules that if a

case is not published, it should not be referred to.

THE COURT: I choose not to follow that rule, which is a very bad rule. Some judge did that on the record. It's a matter of public record. It's appropriate to refer to it.

MS. WEGLARZ: Thank you.

MR. ADAMS: Your Honor, I agree this is not binding authority, but it may be persuasive authority for the Court to consider.

This is a case in which the court held that three affidavits signed by a mesothelioma victim, nearly two months before his death, with zero witnesses, no priest, no notary, just the lawyers and the witness, three months before he died met the hearsay exception for a dying declaration, and the court denied summary judgment.

The court did so because mesothelioma is an always terminal cancer, and the signer knew he was going to die. Mr. Varney signed the declaration the day before he died, and there were multiple witnesses, as the Court knows.

The next case is a Washington State Supreme Court case, State versus Quinn, 56 Wn 295 at Page 299. It is a case that's over 100 years old, but still good law. It approved of the admission of a dying declaration consisting of a statement written by the prosecuting attorney, which was read and signed by the declarant. The

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02:01:54PM 1 defendant was then convicted of first-degree murder in a
02:01:58PM 2 trial involving the admission of that statement written by
02:02:01PM 3 the prosecuting attorney. It has been good law for 110
02:02:05PM 4 years. And it was from the Washington State Supreme
02:02:07PM 5 Court.

02:02:09PM 6 And lastly, your Honor, State versus Gallagher, 4
02:02:19PM 7 Wash. 2d 437. This was a statement made by an individual
02:02:27PM 8 who was involved in an assault and a shooting, and had
02:02:31PM 9 been shot. The court specifically referenced the fact
02:02:36PM 10 that the doctors did not tell him death was imminent.
02:02:39PM 11 Mr. Nelson was not advised by his physician that the death
02:02:43PM 12 was imminent. There was no priest, and it was
02:02:46PM 13 specifically mentioned by the Washington State Supreme
02:02:49PM 14 Court that there was no spiritual advisor present.
02:02:52PM 15 Because, of course, having a spiritual advisor present is
02:02:56PM 16 an indication that death is imminent, as I just argued to
02:03:00PM 17 the Court earlier.

02:03:00PM 18 There was no family. The court specifically
02:03:05PM 19 referenced the fact that the dying victim did not call his
02:03:08PM 20 family to gather at his deathbed. Another indication that
02:03:14PM 21 death was not imminent. Obviously, we have the exact
02:03:17PM 22 opposite in this case.

02:03:18PM 23 The victim did not die until eight days later, eight
02:03:22PM 24 days after he signed -- or he made the statement.

02:03:26PM 25 And the court -- but the court specifically admitted

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02:03:33PM 1 the statement from the victim, because the nature of his
02:03:40PM 2 wounds indicated his knowledge of his imminent death.
02:03:43PM 3 "The nature of the wounds was such that surely Nelson must
02:03:48PM 4 have realized the situation, in view of which he was
02:03:52PM 5 conscious of approaching death."

02:03:57PM 6 And so, your Honor, the Washington State Supreme
02:04:01PM 7 Court has just verified and approved of the inferences and
02:04:04PM 8 the arguments I just made to your Honor at the very
02:04:08PM 9 beginning about Mr. Varney's last days, his condition, his
02:04:13PM 10 loss of weight, his pain, and that he was bones. He must
02:04:19PM 11 have been conscious of his approaching death because of
02:04:22PM 12 the nature of the wounds.

02:04:23PM 13 And so, your Honor, I believe we have shown -- we
02:04:28PM 14 have met the elements of the dying declaration, and we
02:04:31PM 15 have created enough for the issue to go to the jury on
02:04:36PM 16 whether or not Mr. Varney was competent. Thank you so
02:04:38PM 17 much for listening to me.

02:04:41PM 18 THE COURT: Thank you, Mr. Adams.

02:05:42PM 19 MS. WEGLARZ: Good afternoon. May I start? I
02:05:53PM 20 just want to address before I start with my presentation
02:05:58PM 21 that I have prepared with just a few things that Mr. Adams
02:06:01PM 22 just said.

02:06:03PM 23 First, this is in fact a preliminary fact hearing
02:06:08PM 24 under Federal Rule of Evidence 104. As such, your Honor
02:06:12PM 25 is the judge, the trier of fact, and therefore should and

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02:06:18PM 1 must weigh the evidence that was presented over the last
02:06:21PM 2 day and today.

02:06:23PM 3 Second, plaintiff is a proponent of evidence here.
02:06:28PM 4 Plaintiff is the one trying to admit this declaration.
02:06:32PM 5 Therefore, it is their burden to present the evidence to
02:06:36PM 6 prove admissibility of that declaration.

02:06:41PM 7 When we were told about this hearing, you had asked
02:06:44PM 8 us to come, and I have up on the projection, on the ELMO
02:06:49PM 9 right now, what you asked us to bring. You said, "The
02:06:54PM 10 Court would welcome Mrs. Varney's testimony where
02:06:58PM 11 cross-examination is available." The Court already did
02:07:01PM 12 have some of this testimony. In particular, the defense
02:07:06PM 13 in several motions for summary judgment did rely on
02:07:10PM 14 Mrs. Varney's testimony.

02:07:11PM 15 Mrs. Varney is the wife of Donald Varney. She could
02:07:15PM 16 have come here. She did not come here to testify. We
02:07:23PM 17 deposed her in Phoenix, maybe in the fall. She is still
02:07:27PM 18 working. She is not retired. She is able-bodied. She
02:07:31PM 19 could have been here in court today to tell us
02:07:34PM 20 specifically about the declaration, how it was made, what
02:07:40PM 21 happened in that room. And she is not here.

02:07:42PM 22 The Court made note in that order that there is no
02:07:46PM 23 evidence as to the source of information in the affidavit
02:07:51PM 24 or who prepared it. We still don't have that evidence.
02:07:56PM 25 It was not presented yesterday or today.

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02:08:02PM 1 In the order the Court also said, "The Court is aware
02:08:04PM 2 that it may be necessary for one or more of Mr. Varney's
02:08:07PM 3 lawyers to testify." Presumably, it seems like,
02:08:12PM 4 Mr. Varney's lawyers are the ones who have information
02:08:15PM 5 with regards to where the information in the affidavit
02:08:19PM 6 came from and how it was prepared, whose statements are
02:08:23PM 7 actually in that affidavit.

02:08:25PM 8 And, again, that is not the defense's burden to bring
02:08:29PM 9 that evidence into this court. That's plaintiffs' burden.
02:08:34PM 10 And it did not happen.

02:08:36PM 11 I will see if I can get this to work. We are going
02:09:53PM 12 to run it from over here.

02:10:23PM 13 I am going to start with Rule -- Federal Rule of
02:10:27PM 14 Evidence 804(b)(2), which is the dying declaration
02:10:30PM 15 exception. I think when plaintiffs' counsel was
02:10:33PM 16 discussing this rule, it missed some of the important
02:10:36PM 17 points of it. It is a point that looks at the time when
02:10:44PM 18 the statement by the declarant is actually made. There is
02:10:48PM 19 two parts of this rule that I think we need to concentrate
02:10:51PM 20 on for this hearing.

02:10:52PM 21 One, there needs to be proof that the statement was
02:10:55PM 22 actually made by the declarant. Again, in order to note
02:10:59PM 23 these statements were made by the declarant, we have to
02:11:02PM 24 know how that affidavit was put together, who put it
02:11:07PM 25 together, how it was put together, when it was put

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02:11:10PM 1 together.

02:11:12PM 2 The second part that I think is very important in
02:11:15PM 3 this case is that that statement had to have been put
02:11:20PM 4 together for the first time at the time the declarant
02:11:26PM 5 thought his death was imminent, not something he said
02:11:30PM 6 eight or nine times, and now he is saying it again. It
02:11:34PM 7 had to have been said at that moment when he thought death
02:11:40PM 8 was imminent.

02:11:41PM 9 I had brought up when we -- I guess it was just
02:11:46PM 10 yesterday, the case of King versus Woodcock, that famous
02:11:51PM 11 English case. This is where this exception comes from.
02:11:57PM 12 And, again, it has that temporal element, where the party
02:12:01PM 13 when the statement is made -- that it has to be at the
02:12:06PM 14 point of death the first time it is made. But it also has
02:12:09PM 15 to be made when every motive to falsehood is silenced.
02:12:13PM 16 There cannot be any motives.

02:12:16PM 17 Those same justifications for this exception are also
02:12:21PM 18 found in United States jurisprudence, Kirby versus United
02:12:27PM 19 States. Again, we talk about when every motive for
02:12:29PM 20 falsehood must be supposed to have been silenced.

02:12:33PM 21 And, again, here is our temporal evidence that I
02:12:37PM 22 brought up yesterday, in Shepard versus United States,
02:12:42PM 23 that says the declarant must have spoken that statement at
02:12:49PM 24 the time that he was in the shadow of impending death.

02:12:53PM 25 So here is what I think the evidence over the last

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02:12:57PM 1 two days is: I think we still have absolutely no evidence
02:13:03PM 2 regarding how his declaration was created, when it was
02:13:05PM 3 created, who created it, where it was created. We don't
02:13:10PM 4 know any circumstances regarding this declaration. We are
02:13:14PM 5 still in the same spot we were -- as we were last Friday.

02:13:19PM 6 This declaration contains statements made for
02:13:23PM 7 purposes of litigation. It's made with motivation because
02:13:28PM 8 it was made for purposes of litigation.

02:13:33PM 9 At the time when this declaration was presented to
02:13:36PM 10 Mr. Varney in his hospital bed, in his hospital room, we
02:13:42PM 11 still don't have any evidence that he actually read it,
02:13:45PM 12 that he actually knew the contents of it. We don't know
02:13:50PM 13 if he meant to adopt all the contents in it. All we know
02:13:54PM 14 is that he signed it. That's all we know.

02:13:58PM 15 We just don't have any evidence that he knew what he
02:14:02PM 16 was actually signing, what it said, where the content came
02:14:05PM 17 from, or whether it was even his own statements. We don't
02:14:09PM 18 know that, because we don't know how the declaration was
02:14:11PM 19 created, or where the information came from.

02:14:15PM 20 We know that some of the statements in the
02:14:18PM 21 declaration had been said as early as December 20th, when
02:14:23PM 22 he was not fearing imminent death. We knew that some of
02:14:29PM 23 the statements had been said even a year before. These
02:14:33PM 24 are things that he had just been saying for a year.

02:14:37PM 25 Now, there may be a reason why no one at this point

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02:14:43PM 1 remembers the circumstances of how this declaration was
02:14:45PM 2 made, and that's because the plaintiffs never disclosed
02:14:51PM 3 this declaration to the defendants until June 2018. It
02:14:56PM 4 was not disclosed in their initial disclosures. It was
02:14:59PM 5 only disclosed more than four months after it was actually
02:15:02PM 6 signed, when memories had already started to dissipate.

02:15:08PM 7 I think even Mr. Parris said if he had been asked
02:15:11PM 8 about the circumstances surrounding what happened in that
02:15:14PM 9 room, if it had even been a few months earlier it might
02:15:21PM 10 have made a difference.

02:15:22PM 11 I mentioned I thought the evidence in this case shows
02:15:27PM 12 that these were litigation statements. And that legalese
02:15:31PM 13 language in Paragraph 1 of the declaration is an example
02:15:34PM 14 of how it is a litigation statement. It mirrors the exact
02:15:39PM 15 language of the evidence rule. Mr. Varney was not a
02:15:45PM 16 lawyer. This is not the kind of language that would have
02:15:48PM 17 come out of his mouth, his own statements.

02:15:51PM 18 The other paragraphs mirror other language of legal
02:15:58PM 19 documents in this case, and particularly the December 20th
02:16:02PM 20 complaint and the January 11th interrogatory responses.

02:16:09PM 21 What's notable is in those interrogatory responses
02:16:15PM 22 this is the language that is in there: "I believe my
02:16:18PM 23 attorneys have information suggesting that I was exposed
02:16:21PM 24 to the defendants' asbestos products during my time
02:16:25PM 25 working as a marine machinist at the shipyards." This

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02:16:30PM 1 suggests that information is coming from the attorneys.

02:16:35PM 2 If we go paragraph by paragraph in this declaration
02:16:40PM 3 we see it mirrored with the interrogatory responses and
02:16:45PM 4 the complaint.

02:16:46PM 5 For example, Paragraph 2 in the declaration
02:16:49PM 6 corresponds to Interrogatory Response No. 13. Paragraph 2
02:16:57PM 7 corresponds with complaint paragraphs 17 and 54(c).

02:17:08PM 8 Paragraph 3 in the declaration corresponds to
02:17:16PM 9 Plaintiffs' Interrogatory Response No. 11, which, again,
02:17:21PM 10 is the, "I believe my attorneys have information
02:17:24PM 11 suggesting that I was exposed to" language. That
02:17:29PM 12 Paragraph 3 also corresponds to Paragraph 54(b) in the
02:17:34PM 13 December complaint.

02:17:38PM 14 Paragraph 4 in the declaration corresponds almost
02:17:42PM 15 exactly to the Interrogatory Response No. 12. This is the
02:17:52PM 16 response that lists out all the product manufacturers
02:17:56PM 17 specifically.

02:18:02PM 18 Declaration Paragraph 4 corresponds with Paragraphs 1
02:18:06PM 19 through 47, and 54(d) in the complaint. For illustrative
02:18:10PM 20 purposes I only have John Crane's paragraph up here. But
02:18:14PM 21 every defendant in this case has a similar paragraph as
02:18:20PM 22 ascribed to it in the complaint.

02:18:25PM 23 Paragraphs 5 and 6 --

02:18:30PM 24 THE COURT: Hold on a second.

02:18:30PM 25 MS. WEGLARZ: Do you want me to go back? If the

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02:18:38PM 1 Court would like, we can give you copies of that if you
02:18:41PM 2 don't want --

02:18:42PM 3 THE COURT: Just a minute. Give me a minute. Go
02:19:39PM 4 ahead.

02:19:42PM 5 MS. WEGLARZ: Paragraphs 5 and 6 are more
02:19:47PM 6 general, but they are still indicated in the Interrogatory
02:19:52PM 7 Response No. 12 that we find in that set of January 11th
02:19:55PM 8 responses to interrogatories.

02:19:59PM 9 Paragraph 7 of the declaration directly corresponds
02:20:04PM 10 to the Interrogatory Response No. 12 in that January 11th
02:20:09PM 11 set of interrogatories. I think that is supposed to say
02:20:19PM 12 Paragraph 7, not Paragraph 4. Paragraph 7 of the
02:20:22PM 13 declaration also corresponds to Paragraph 58 of the
02:20:26PM 14 complaint, which has to do with the warnings.

02:20:32PM 15 The complaint and the interrogatory responses, these
02:20:38PM 16 were statements made well in advance of Mr. Varney ever
02:20:45PM 17 going into the hospital. They were made well in advance
02:20:48PM 18 of him ever being under fear of imminent death.

02:20:53PM 19 THE COURT: Just one more second. I am trying to
02:20:56PM 20 figure something out here. I'm sorry. Go ahead.

02:21:47PM 21 MS. WEGLARZ: These statements about Mr. Varney's
02:21:54PM 22 asbestos exposures had also been spoken about by
02:21:58PM 23 Mr. Varney months before he was in the hospital.
02:22:05PM 24 Mrs. Varney told us that.

02:22:08PM 25 She also told us he did not use specifics, like

02:22:12PM 1 talking about gaskets and packing, but he did talk about
02:22:16PM 2 how he thought it was, in general, asbestos exposures,
02:22:19PM 3 causing his mesothelioma, at the shipyards. But, again,
02:22:23PM 4 these were not statements made for the first time while
02:22:27PM 5 his death is imminent.

02:22:30PM 6 She says that these statements were made to her by
02:22:39PM 7 her husband before he was even diagnosed with
02:22:43PM 8 mesothelioma, before he even knew he had a terminal
02:22:49PM 9 cancer.

02:22:50PM 10 These kind of statements about his asbestos exposures
02:22:54PM 11 in the shipyard were also made to his doctor more than six
02:22:59PM 12 months before his mesothelioma diagnosis, a year before
02:23:03PM 13 that declaration was ever executed in the hospital room.

02:23:09PM 14 It says in the medical records that Mr. Varney
02:23:18PM 15 discussed with Dr. Sharma extensively regarding
02:23:23PM 16 asbestos-induced lung disease, and that the patient was
02:23:28PM 17 exposed to asbestos from the age of 18 to 30 when he was
02:23:32PM 18 working in the shipyards.

02:23:33PM 19 However, the fact that Mr. Varney is saying the same
02:23:39PM 20 thing four, five different kinds of ways, at least that we
02:23:44PM 21 know of in the evidence, that does not make those
02:23:47PM 22 statements some sort of magical dying declaration when
02:23:51PM 23 they are said another time during the course of
02:23:55PM 24 litigation, whether or not it is in a hospital room or
02:23:59PM 25 not. It does not magically transform these words into

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02:24:03PM 1 something without motivation, without this fear of meeting
02:24:10PM 2 your maker with a lie upon your lips. It does not fit the
02:24:17PM 3 policy considerations for this exception.

02:24:20PM 4 The context of all those prior statements, at least
02:24:24PM 5 the ones in December and January, they are made in the
02:24:28PM 6 context -- they were made in the context of litigation
02:24:32PM 7 that was started by the declarant himself. There was
02:24:37PM 8 motivation there.

02:24:38PM 9 With regards to the evidence that plaintiffs brought
02:24:43PM 10 into this courtroom to support the admissibility of this
02:24:49PM 11 declaration, here is the evidence that they brought: They
02:24:52PM 12 brought you Mr. Parris, who has absolutely no memory of
02:24:55PM 13 Mr. Varney or the notarization event whatsoever, except
02:25:00PM 14 for the fact that there was a \$100 bill. That's all he
02:25:05PM 15 remembers. Other than that, he couldn't tell us anything.

02:25:08PM 16 And, again, he doesn't know when the declaration was
02:25:12PM 17 created. He doesn't know who created it. He doesn't know
02:25:17PM 18 if Mr. Varney read it. He said it is not a requirement
02:25:21PM 19 that a document be read before it is notarized. He never
02:25:26PM 20 sees documents read.

02:25:30PM 21 And, again, the acknowledgment that he put on that
02:25:34PM 22 document merely said that it was Mr. Varney signing it.
02:25:37PM 23 He said it does not verify the trustworthiness of the
02:25:41PM 24 document, it just identifies the signer.

02:25:44PM 25 The plaintiffs also brought you Dr. Sharma by way of

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02:25:50PM 1 deposition. Again, he had no testimony regarding who
02:25:55PM 2 drafted the declaration, how it was drafted, when it was
02:25:59PM 3 drafted, or why it was drafted.

02:26:03PM 4 We know that Dr. Sharma saw Mr. Varney maybe around
02:26:08PM 5 8:30 or earlier that day. We also know that Dr. Kercheval
02:26:12PM 6 saw him closer in time to the declaration. Dr. Kercheval
02:26:18PM 7 saw him within a half hour of that declaration being
02:26:21PM 8 executed. So even Dr. Sharma, when he saw Mr. Varney, the
02:26:29PM 9 time is more attenuated than when Dr. Kercheval saw
02:26:32PM 10 Mr. Varney.

02:26:34PM 11 And Dr. Sharma said in his deposition, with regards
02:26:37PM 12 to those nurses' notes, "I don't vouch for the nurses."
02:26:42PM 13 And he did describe how sometimes nurses' notes have
02:26:46PM 14 auto-populated parts to them.

02:26:52PM 15 And he, in the end, deferred to Dr. Kercheval's
02:26:54PM 16 findings when he was asked with regards to whether or not
02:26:58PM 17 Dr. Kercheval using the term "obtunded" was in fact
02:27:03PM 18 correct.

02:27:05PM 19 Plaintiffs, by declaration, brought you Father
02:27:13PM 20 Schimmel's testimony. Again, Father Schimmel does not say
02:27:17PM 21 when this document was created, doesn't know who created
02:27:21PM 22 it, doesn't say how the document was created.

02:27:24PM 23 He confirmed that they actually put off the signing
02:27:28PM 24 because there was no notary in the room. However, they
02:27:31PM 25 could have just videotaped him signing the document that

02:27:35PM 1 evening, or even the next day.

02:27:38PM 2 But the fact that they even put off signing it kind
02:27:41PM 3 of just shows you that it is an orchestrated plan. It was
02:27:45PM 4 not something on your deathbed. If you are doing
02:27:47PM 5 something on your deathbed, you do it then, you make it
02:27:51PM 6 happen at that point if it is really -- you are thinking
02:27:54PM 7 that death is imminent. You don't put it off.

02:27:57PM 8 Dawn Brown -- I think the Court knows this, but the
02:28:10PM 9 defense did not have the ability to depose Ms. Brown
02:28:13PM 10 before she took the stand the other day. So that was our
02:28:16PM 11 first chance to talk to Ms. Brown.

02:28:18PM 12 And what she did tell us was a little different from
02:28:22PM 13 how we had heard the events before. But we do know that
02:28:26PM 14 she is the one who found Mr. Adams and his law firm. And
02:28:31PM 15 she has a financial stake in the outcome of this case.
02:28:35PM 16 That's the only person they brought you live to testify
02:28:39PM 17 here today, someone with a financial stake in the outcome
02:28:42PM 18 of this hearing and this case.

02:28:44PM 19 She also said that her father had been telling her
02:28:49PM 20 about these asbestos exposures, not for the first time on
02:28:53PM 21 his deathbed, but for months before.

02:28:56PM 22 She said she had never seen the declaration before
02:28:59PM 23 the day it was signed. She doesn't know who created it.
02:29:04PM 24 She doesn't know how it was created. She doesn't know
02:29:07PM 25 when it was created. She doesn't know where it was

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02:29:10PM 1 created. And she doesn't know where the information in
02:29:13PM 2 the affidavit came from.

02:29:15PM 3 She doesn't know if anyone told her father what the
02:29:20PM 4 declaration said. She doesn't know if he read it. She
02:29:23PM 5 doesn't know if it was read to him.

02:29:27PM 6 She told us that her father felt like, when he got
02:29:33PM 7 diagnosed, he needed to do something about it. He wanted
02:29:38PM 8 something to happen because of what happened to him.
02:29:44PM 9 That, and also he wanted to take care of his wife Gloria.
02:29:48PM 10 That's motive right there for making -- Even if those
02:29:53PM 11 were his own statements, he had motive in making those
02:29:57PM 12 statements that were made for this complaint and for this
02:30:00PM 13 lawsuit that wound up in another declaration. Even if he
02:30:05PM 14 knew what was in that declaration when he signed it, they
02:30:08PM 15 were just statements that he had prepared in anticipation
02:30:11PM 16 of litigation, with a motive.

02:30:13PM 17 Mrs. Varney, Gloria, you were given her deposition to
02:30:21PM 18 read. Again, she gives no information regarding who
02:30:25PM 19 created that declaration, how it was created, when it was
02:30:29PM 20 created, where it was created, or where the information
02:30:32PM 21 came from.

02:30:35PM 22 And I think what is notable about Mrs. Varney is that
02:30:38PM 23 her testimony completely contradicts Mrs. Brown's
02:30:45PM 24 testimony. When we deposed Mrs. Varney in the fall -- I
02:30:51PM 25 deposed her in the fall in Phoenix, she told us that on

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02:30:55PM 1 the day that this declaration was signed, her husband
02:30:59PM 2 couldn't talk. He did not talk. Her husband's last words
02:31:04PM 3 were said to her three or four days before he died, so a
02:31:09PM 4 few days before the declaration was signed. I asked her,
02:31:11PM 5 "What were your husband's last words?" He said, "I love
02:31:16PM 6 you, Gloria," or something to that effect, three or four
02:31:19PM 7 days before. That is something memorable.

02:31:22PM 8 She told us -- The question was, "Was there any
02:31:29PM 9 conversation that happened during this time when the
02:31:32PM 10 priest and the notary were present in the hospital room
02:31:36PM 11 when your husband signed the declaration?" She said, "No.
02:31:40PM 12 Everyone was quiet. The priest was to his side, the
02:31:44PM 13 notary was in front, watching. I was next to my husband.
02:31:47PM 14 The lawyer was here. We were just looking at him. I was
02:31:50PM 15 the one that was next to him, but we were just there,
02:31:54PM 16 watching. The notary was watching everything. But no one
02:31:58PM 17 talked. He just looked at me when they gave him the paper
02:32:02PM 18 and he held the paper, and then he signed. He signed it
02:32:06PM 19 and he laid backwards."

02:32:09PM 20 This is in stark contrast to Ms. Brown coming in here
02:32:15PM 21 and saying that he in fact said something to the effect
02:32:18PM 22 of, "I am coherent. I know what I am signing," something
02:32:24PM 23 to that effect. It is completely contradictory to what
02:32:28PM 24 Ms. Varney told us back in November.

02:32:37PM 25 I think Ms. Varney also gives us evidence showing

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02:32:42PM 1 that Mr. Varney did have motive in making this sort of a
02:32:47PM 2 declaration, if in fact he did have any sort of
02:32:52PM 3 cooperation in drafting it. The question to her at the
02:32:57PM 4 deposition was, "You said when he started he wanted to do
02:33:02PM 5 this." "What do you mean by 'when he started'?" And we
02:33:06PM 6 are talking about the lawsuit here. Her answer was, "When
02:33:08PM 7 they told him that he was ill from the asbestos he wanted
02:33:13PM 8 to do something because of his illness. So he knew that
02:33:17PM 9 if he did that paperwork, he would help me. So he wanted
02:33:21PM 10 me to be okay. And that's what he was waiting for, to
02:33:25PM 11 sign those papers." That's motive.

02:33:27PM 12 This takes us back to the case law, where it says for
02:33:35PM 13 a dying declaration that motive is supposed to have been
02:33:39PM 14 silenced, it is not supposed to be present like it was
02:33:43PM 15 here.

02:33:44PM 16 This brings us back to the summary of evidence, as
02:33:46PM 17 least with regard to why there was no evidence to support
02:33:50PM 18 admissibility of this document as a dying declaration
02:33:53PM 19 under FRE 804(b). And I think it still comes down to the
02:34:01PM 20 fact that we don't know how that declaration was made, we
02:34:05PM 21 don't know that Mr. Varney knew the information in that
02:34:09PM 22 declaration, even what it was. We have no idea. We don't
02:34:13PM 23 know if he collaborated with it. We don't know if it was
02:34:18PM 24 him helping the lawyers draft it. We still don't know
02:34:22PM 25 nothing -- don't know anything. Take out the double

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02:34:26PM 1 negative.

02:34:26PM 2 I also want to address just really briefly the
02:34:30PM 3 residual exception that is found in Federal Rule of
02:34:34PM 4 Evidence 807, because this was also an issue raised for
02:34:38PM 5 this hearing. There are four elements that need to be met
02:34:47PM 6 in order for a declaration or statement to come into
02:34:53PM 7 evidence under this hearsay exception.

02:34:56PM 8 The first element is circumstantial guarantees of
02:34:59PM 9 trustworthiness. The Ninth Circuit does give us twelve
02:35:03PM 10 different steps to show how that trust -- the guarantee of
02:35:09PM 11 trustworthiness is established. None of those steps are
02:35:13PM 12 met here, none of those elements.

02:35:16PM 13 We have a declarant -- Well, this one, actually. It
02:35:20PM 14 says whether declarant was under oath. I know that
02:35:24PM 15 declaration says "signed under penalty of perjury," but if
02:35:29PM 16 we don't have the evidence that he knew what he was
02:35:31PM 17 signing, or that he actually read it, I think just having
02:35:34PM 18 a document that says "under penalty of perjury" doesn't
02:35:37PM 19 mean anything if the person doesn't know -- there is no
02:35:42PM 20 evidence he knows what he is actually signing.

02:35:44PM 21 Again, the statement about whether or not the
02:35:49PM 22 statement is voluntary. We don't even know if it is his
02:35:52PM 23 statement or not, because we don't know how that
02:35:54PM 24 declaration was created.

02:35:56PM 25 Whether or not it is based on personal knowledge.

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02:35:59PM 1 Again, we don't know this because we don't know how that
02:36:02PM 2 declaration was created. We do know in the
02:36:06PM 3 interrogatories it says that same information was told to
02:36:09PM 4 him by his attorneys. And that, again, is in response to
02:36:14PM 5 Interrogatory No. 11.

02:36:18PM 6 Contradicted by previous statements. We don't have
02:36:21PM 7 that here.

02:36:22PM 8 Statement preserved on videotape. That could have
02:36:26PM 9 happened here. Everyone pretty much has smartphones now.
02:36:31PM 10 It could have been videotaped. It wasn't.

02:36:35PM 11 Mr. Varney is not available for cross-examination,
02:36:38PM 12 which is the sixth element.

02:36:40PM 13 Seven, which is the proximity of the statement in
02:36:46PM 14 time to the events it describes. Well, this declaration
02:36:48PM 15 is describing events that were 40 and 50 years ago.

02:36:51PM 16 Whether or not the statement has been corroborated.
02:36:55PM 17 Here, it has not been.

02:36:57PM 18 Nine, whether there is motivation to fabricate. I
02:37:02PM 19 think I have addressed that throughout this presentation,
02:37:04PM 20 with regard to Mr. Varney being the declarant and
02:37:09PM 21 Mr. Varney having brought his own lawsuit.

02:37:11PM 22 Ten, whether it was a statement prepared in
02:37:15PM 23 anticipation of litigation. Again, those same statements
02:37:18PM 24 do show up in the complaint and the interrogatories.

02:37:22PM 25 The statement's spontaneity. By the mere fact that

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02:37:26PM 1 it is in this prepared declaration, I think that takes
02:37:29PM 2 away from that spontaneity completely.

02:37:32PM 3 Whether or not the declarant's perception or memory
02:37:36PM 4 is faulty. We didn't really address that in this
02:37:40PM 5 particular hearing.

02:37:42PM 6 I think when you take all of these steps together, we
02:37:47PM 7 don't come back to that -- we don't have that guarantee of
02:37:51PM 8 trustworthiness that would allow it to fit under the
02:37:54PM 9 residual exception of Federal Rule of Evidence 807.

02:38:01PM 10 And I think -- Again, the summary of the evidence is
02:38:08PM 11 in fact that this was merely another piece of paper that
02:38:16PM 12 was made in the context of litigation. And without
02:38:23PM 13 knowing, again, how, who, or when, or what, or anything
02:38:29PM 14 about that declaration, we are still left in the same spot
02:38:32PM 15 we were last Friday.

02:38:33PM 16 And with that, I am going to end, and I would ask
02:38:38PM 17 this Court to rule that declaration is in fact not
02:38:44PM 18 admissible under either 804 or 807. Thank you.

02:38:50PM 19 THE COURT: Counsel. Let's take ten so I don't
02:39:01PM 20 have to interrupt you.

02:50:01PM 21 (Recessed.)

02:54:45PM 22 THE COURT: Counsel, I trust you are not going to
02:54:49PM 23 tell me anything that your colleague just told me?

02:54:53PM 24 MR. VEGA: I am going to try not to. We do have
02:54:56PM 25 some duplicate slides, and I intend to gloss over those

02:55:00PM 1 very quickly. I am mindful of your time and everyone
02:55:03PM 2 else's time.

02:55:04PM 3 Your Honor, this particular case and these particular
02:55:10PM 4 set of circumstances create a serious problem in this
02:55:17PM 5 litigation and, quite frankly, may have drastic
02:55:21PM 6 implications throughout the country, as you have already
02:55:26PM 7 seen.

02:55:27PM 8 In fact, one of the decisions that I believe
02:55:31PM 9 plaintiffs' counsel referenced earlier, the Pisano case
02:55:35PM 10 out of Rhode Island -- I believe that is one of their
02:55:38PM 11 cases, also. And this has become the standard -- or a
02:55:43PM 12 practice that this firm is engaging in, and I fear that it
02:55:48PM 13 is going to spread. I fear that this particular situation
02:55:50PM 14 that we are seeing here is -- will mark the end of
02:55:56PM 15 mesothelioma depositions for defendants in all of these
02:56:01PM 16 cases.

02:56:02PM 17 THE COURT: What does that mean to me?

02:56:05PM 18 MR. VEGA: What it means to you is this is really
02:56:07PM 19 just a way of using an evidentiary rule not the way it is
02:56:13PM 20 intended, and to basically just, "You know what, I am just
02:56:19PM 21 going to get a declaration from my witness, and so long as
02:56:23PM 22 I get a declaration" -- "basically I create a contract,"
02:56:27PM 23 as the plaintiffs' counsel, "create a contract and just
02:56:30PM 24 have my client sign it." All of a sudden now it becomes
02:56:36PM 25 affirmative evidence against all of the other defendants.

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02:56:40PM 1 That cannot be allowed to happen.

02:56:43PM 2 In fact, that is the definition of a self-serving
02:56:47PM 3 statement. That's never admissible anywhere. In fact,
02:56:51PM 4 the only way it is admissible is if the defendants want to
02:56:54PM 5 use it -- so thank you -- if the defendants want to use it
02:56:58PM 6 to prove up shares, because now it is a statement made by
02:57:00PM 7 the plaintiff. But the plaintiff can't use it
02:57:02PM 8 affirmatively, which is what they are trying to do here.

02:57:05PM 9 The key issue, and this is something that we have to
02:57:12PM 10 keep in mind, it's when the statement was first uttered,
02:57:17PM 11 not when it was last uttered. When was it first uttered?
02:57:22PM 12 And we have to distinguish between when those words were
02:57:26PM 13 first made versus when the declaration was signed. Who
02:57:32PM 14 cares when the declaration was signed? It's when were
02:57:37PM 15 those words said. That's what we are interested in here.

02:57:41PM 16 What we have here -- and this is, again, the danger
02:57:46PM 17 in this situation -- is that we have declarations that
02:57:52PM 18 were prepared by attorneys all throughout. That is
02:57:57PM 19 essentially their case.

02:57:58PM 20 So with Dr. Kercheval, who they say is our star
02:58:02PM 21 witness -- they say it is our star witness, but then they
02:58:04PM 22 say Dr. Sharma is their star witness.

02:58:08PM 23 Look. I guarantee you Dr. Kercheval did not put that
02:58:12PM 24 caption on that document. That was prepared by
02:58:16PM 25 plaintiffs' counsel.

02:58:17PM 1 And we see a doctor who was alert and oriented times
02:58:23PM 2 four, I'm sure, when he signed this. He signed this
02:58:26PM 3 document that was given to him by plaintiffs' counsel, and
02:58:31PM 4 it actually had two mistakes. But you know what, we would
02:58:35PM 5 not have known that the document had two mistakes. The
02:58:37PM 6 only way we knew the document had two mistakes is because
02:58:41PM 7 we took his deposition. In fact, this doctor, who
02:58:44PM 8 graduated from medical school, actually signed a
02:58:46PM 9 declaration saying he went to the wrong medical school,
02:58:50PM 10 and absolutely signed the document saying that he was on
02:58:53PM 11 staff for a hospital that he was never on staff for.

02:58:57PM 12 At his deposition on Page 53 he corrects those.
02:59:01PM 13 Fortunately, we had the opportunity to depose him. We did
02:59:04PM 14 not have that opportunity with Mr. Varney.

02:59:06PM 15 Here, also -- And the interesting thing -- I don't
02:59:11PM 16 know why -- I see that they had to bill -- Mr. Parris had
02:59:16PM 17 to bill them for the remainder \$25. But this declaration
02:59:19PM 18 was signed on the same day as Mr. Varney signed his
02:59:23PM 19 declaration. But for some reason on this one there is no
02:59:26PM 20 acknowledgment. I don't know why they didn't notarize
02:59:29PM 21 this one.

02:59:31PM 22 Another -- Look. So this is another
02:59:35PM 23 attorney-prepared document. This is the declaration of
02:59:38PM 24 Father Schimmel. Interesting thing here is that Father
02:59:46PM 25 Schimmel never mentions the daughter by name. Right?

02:59:49PM 1 The other thing is this document -- this document
02:59:52PM 2 wasn't signed contemporaneous with the act that occurred
02:59:57PM 3 in the hospital. Right? They didn't have Father Schimmel
03:00:01PM 4 sign a declaration also. We know they had declarations.
03:00:04PM 5 Right? They had Mr. Varney sign a declaration. They had
03:00:08PM 6 Dr. Kercheval sign a declaration. This one was signed 14
03:00:12PM 7 months later, and Father Schimmel is supposed to recount
03:00:16PM 8 the events of what happened, and he doesn't even remember
03:00:18PM 9 the daughter by name.

03:00:20PM 10 The other attorney-prepared document is Mr. Varney's
03:00:25PM 11 interrogatory responses from January 16 -- That year is
03:00:32PM 12 wrong. That wasn't the year. Sorry. But this one
03:00:36PM 13 contains a mistake, as well.

03:00:38PM 14 THE COURT: They were 2018.

03:00:42PM 15 MR. VEGA: 2018, that's right. This one, if you
03:00:45PM 16 notice where Donald Varney signed -- now, this is three
03:00:49PM 17 weeks before he signs the declaration -- it says that
03:00:54PM 18 plaintiff, Maria Varney, being duly deposed. He signs the
03:00:59PM 19 document. He doesn't cross out. He doesn't make the
03:01:02PM 20 change. He doesn't correct the paper. And we see that
03:01:05PM 21 they corrected stuff. Right? They had the wrong state,
03:01:08PM 22 state of Washington. That's crossed out, Arizona. No
03:01:11PM 23 attempt to correct the error here in plaintiffs' document.

03:01:15PM 24 Another one. Again, this is Donald Varney's
03:01:22PM 25 declaration of February 7, 2018. And look at what we see

03:01:26PM 1 here. It says, "I make these statements regarding the
03:01:30PM 2 cause and circumstances of my death." But he is still
03:01:36PM 3 alive. Again, we don't have an opportunity to ask him
03:01:39PM 4 questions about these documents.

03:01:42PM 5 Again, the attorney-prepared documents. Plaintiffs'
03:01:51PM 6 responses to CBS on October 26th of 2018. He doesn't
03:01:56PM 7 provide any information. He is specifically asked, "Tell
03:02:00PM 8 us how this declaration was made." Quite frankly, the
03:02:03PM 9 defendants have the same question your Honor had of this
03:02:07PM 10 same document, how is it made? They claim attorney work
03:02:11PM 11 product.

03:02:14PM 12 And we asked him who was present at the signing of
03:02:16PM 13 the declaration. Who was missing? Mr. Varney's daughter
03:02:22PM 14 is not listed there. That is precisely why we asked for
03:02:25PM 15 the metadata, because we need information about how, and
03:02:30PM 16 when, and who created this document.

03:02:35PM 17 Plaintiffs' counsel actually said, you know, he was
03:02:37PM 18 present. Take the stand if you were present. Right? It
03:02:42PM 19 is not our burden. He is the proponent of the evidence.
03:02:46PM 20 And never once attempted -- He wants us to cure his
03:02:49PM 21 mistake. Give us the metadata. If he gave us the
03:02:52PM 22 metadata, we would be crossing him on the stand. Without
03:02:55PM 23 the metadata, we weren't going to cross him.

03:02:58PM 24 This is the spouse. On four separate occasions when
03:03:06PM 25 we take her deposition she has an opportunity to tell us

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03:03:10PM 1 whether Dawn is present in the hospital. And she never
03:03:13PM 2 does. The first time on Page 60, "Other than Mr. Parris,
03:03:18PM 3 you, your husband, was anyone else present when your
03:03:21PM 4 husband signed this document?" Answer: "There was a
03:03:24PM 5 priest there." "Anyone else?" "Just Ben, the priest, the
03:03:27PM 6 notary, myself, and my husband."

03:03:32PM 7 Skip a little further. Next time this comes up as to
03:03:35PM 8 who is present: "You indicated that you were present when
03:03:38PM 9 your husband signed this document, correct?" Answer:
03:03:41PM 10 "Yes. When he signed this document there was a priest,
03:03:44PM 11 there was a notary. My husband was awake, he was awake."
03:03:47PM 12 No mention of Dawn.

03:03:49PM 13 Again, Page 75. "No. Everyone was quiet. The
03:03:56PM 14 priest was to his side, the notary was in front, watching.
03:03:59PM 15 I was next to my husband. The lawyer was there. We were
03:04:02PM 16 just looking at him." No mention of Dawn.

03:04:07PM 17 Page 95, the same deposition transcript which we have
03:04:11PM 18 given to your Honor: Answer: "No. We were all there.
03:04:14PM 19 The priest was there. The attorney was there. I was next
03:04:16PM 20 to my husband. And the notary had the book." No mention
03:04:22PM 21 of Dawn.

03:04:23PM 22 And we know when we spoke with Dawn she said she
03:04:28PM 23 would ride in with Ms. Varney every morning after
03:04:31PM 24 Ms. Varney would come home and take a shower. We also
03:04:34PM 25 know from Ms. Varney's deposition that she said that

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03:04:37PM 1 day -- because she knew the declaration was going to be
03:04:40PM 2 signed that day, and she didn't want to miss it, she never
03:04:42PM 3 went home that day.

03:04:44PM 4 The deposition of Ms. Varney. "Was there any
03:04:50PM 5 conversation that happened during this time when the
03:04:53PM 6 priest and the notary were present in the hospital room
03:04:56PM 7 with your husband -- when your husband signed this
03:05:00PM 8 declaration?" "No. Everyone was quiet. The priest was
03:05:04PM 9 to his side." She goes -- We have read this. And then
03:05:07PM 10 she says, "But no one talked."

03:05:12PM 11 Again, this is the deposition of Mr. Parris that we
03:05:16PM 12 heard yesterday. And he is asked, "Can you tell us
03:05:21PM 13 whether or not it's your pattern and practice to have an
03:05:24PM 14 individual read a document and comprehend the document
03:05:27PM 15 before signing it and placing your notary seal on the
03:05:30PM 16 document?" "That has never happened." Never happened.

03:05:38PM 17 This is the progress note of Dr. Kercheval. And a
03:05:42PM 18 lot has been said about it. Again, this is at -- this is
03:05:46PM 19 on February 7th, 11:30, a half hour before he signs it.
03:05:50PM 20 He is now -- And Dr. Kercheval, who was his attending
03:05:54PM 21 physician, and unlike --

03:05:57PM 22 Plaintiffs' counsel has told you several times
03:05:59PM 23 already how much they love Sharma. Dr. Sharma was a
03:06:04PM 24 specialist there. He was not involved in Mr. Varney's
03:06:07PM 25 day-to-day care. The individual who saw him from the

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03:06:11PM 1 first day he entered until the very last day he was there.
03:06:15PM 2 Even more so than the nurses, because the nurses, they
03:06:18PM 3 rotate. This doctor works 14 days in a row, says that he
03:06:23PM 4 is now unable to provide any information and is nearly
03:06:27PM 5 obtunded. And we went through the definition of obtunded:
03:06:33PM 6 Diminished arousal, awareness, neurological catastrophe.

03:06:39PM 7 When we are talking to Dr. Kercheval, "What was
03:06:43PM 8 Mr. Varney's condition on the 7th?" "He had actually at
03:06:46PM 9 that point -- I make a note that he was essentially
03:06:48PM 10 obtunded. In other words, he was not responding to verbal
03:06:51PM 11 stimuli."

03:06:55PM 12 Two days -- And so -- Again, we don't know, because
03:07:03PM 13 there was an objection on attorney-client privilege, which
03:07:08PM 14 does not exist in this instance when they have actually
03:07:12PM 15 turned over the document. That privilege has been waived.
03:07:14PM 16 But two days before the declaration is signed we have
03:07:19PM 17 Dr. Kercheval, who, again, is seeing him every single day,
03:07:22PM 18 is saying that they have had discussions with the family
03:07:26PM 19 but the patient is unable to significantly contribute to
03:07:30PM 20 the discussion.

03:07:32PM 21 When we asked him about -- we asked Dr. Kercheval
03:07:35PM 22 about that February 5th examination he tells us, "He just
03:07:40PM 23 wasn't cognitively able to contribute to that discussion?"
03:07:45PM 24 And he answers, "Yes."

03:07:48PM 25 When we spoke with Ms. Varney, we learned that

03:07:55PM 1 four -- he was last out of the bed at least four days
03:07:58PM 2 before he passed, and he last spoke three to four days
03:08:02PM 3 before. She is asked, "How many days before he died did
03:08:06PM 4 he stop getting out of bed?" Answer: "Okay. He died on
03:08:10PM 5 the 7th. About four days before he wouldn't get out."

03:08:14PM 6 Going to Page 85. Question: "Ms. Varney, do you
03:08:18PM 7 remember the last thing your husband said?" Answer:
03:08:21PM 8 "Well, when we talked, I was telling him that I loved him.
03:08:24PM 9 The last thing he said to me was, 'Gloria, I love you.'
03:08:28PM 10 That was it. And then after that we didn't talk. He said
03:08:32PM 11 that to me." Question: "Do you remember what day that he
03:08:35PM 12 said that he loved you?" Answer: "Before he died, about
03:08:38PM 13 three days, I think. Three or four days before, yes."

03:08:43PM 14 And then we get Ms. Dawn Brown, the daughter, who
03:08:50PM 15 says that she recalls hearing her father say, "I'm
03:08:58PM 16 coherent. I know what I'm signing."

03:09:02PM 17 When you give that some thought, I mean, who says
03:09:08PM 18 that, really? You get pulled over -- someone gets pulled
03:09:13PM 19 over for driving while intoxicated, driving while
03:09:18PM 20 impaired, who says, "I'm coherent"? Why is that the first
03:09:22PM 21 thing that comes out of his mouth? Out of nowhere he just
03:09:26PM 22 pops up and he says, "I'm coherent."

03:09:28PM 23 And then the most curious thing is, why do we wait
03:09:34PM 24 until yesterday to learn that that's what he said?

03:09:39PM 25 They asserted attorney-client privilege. This is

03:09:44PM 1 someone they had access to. We filed motions in the case.
03:09:50PM 2 Why do we go to talk to Mr. Parris? Why do we go over
03:09:54PM 3 talking to all of the doctors? Why didn't we just depose
03:09:57PM 4 Dawn Brown? Why didn't they just produce Dawn Brown?
03:10:02PM 5 They wait until yesterday, and we all learn it at the same
03:10:05PM 6 time, this incredible statement, "I am coherent" and "I
03:10:09PM 7 know what I'm saying."

03:10:10PM 8 The priest tells us that when -- At that point he
03:10:13PM 9 opened his eyes. Right? So everyone is like, "He opened
03:10:17PM 10 his eyes." What does that mean? His eyes were closed,
03:10:20PM 11 yet somehow he knows what he is signing. How? He hasn't
03:10:24PM 12 spoken for days.

03:10:25PM 13 We know that he is heavily medicated, and he is
03:10:31PM 14 not -- he is on palliative care. We know that his
03:10:36PM 15 situation is dire. We know that he is on some serious
03:10:40PM 16 medication. We know that he is a 78-year-old man. We
03:10:44PM 17 know that -- from the daughter that he wears glasses. He
03:10:48PM 18 has been laying in bed, essentially nonresponsive, for
03:10:51PM 19 three to four days. So much medication.

03:10:56PM 20 Even aside from -- The side effects from the
03:10:59PM 21 medication, you are sleeping three to four days. All of a
03:11:02PM 22 sudden you can pop up? He has bed sores for a reason.
03:11:07PM 23 The medical records show the nurses have to move him every
03:11:11PM 24 two hours. And somehow he is able to say he knows what he
03:11:16PM 25 is signing, "I am coherent"?

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03:11:19PM 1 Dr. Kercheval also tells us that patients such as
03:11:28PM 2 Mr. Varney -- he actually said Mr. Varney when we deposed
03:11:32PM 3 him -- but this is his declaration -- that their mental
03:11:36PM 4 faculties often diminish due to the disease process and
03:11:41PM 5 the medications. Unfortunately, Mr. Varney is suffering
03:11:45PM 6 with both of those conditions right now -- back then.

03:11:48PM 7 So the evidence has shown that he is unable to
03:11:50PM 8 testify. He could not speak, had not spoken for days.
03:11:54PM 9 He's unable to provide (sic) any medication.

03:11:58PM 10 Ms. Varney was shocked that he could sit and look at
03:12:01PM 11 the declaration.

03:12:03PM 12 Even Mr. Parris, who walked into the room -- We
03:12:08PM 13 learned that also yesterday for the first time from
03:12:11PM 14 Ms. Brown, who has -- "Well, is he going to be able to
03:12:14PM 15 sign?" Someone who doesn't even know Mr. Varney
03:12:17PM 16 recognizes the condition he is in.

03:12:19PM 17 I don't think it is any secret that that's why we
03:12:22PM 18 don't have a photo to know what he looked like then.
03:12:25PM 19 Everyone had, I'm sure, their cellphones. No one pulled
03:12:29PM 20 anything out. They had a video scheduled for that day.

03:12:34PM 21 Specifically in the Court's order you actually tell
03:12:44PM 22 all of us -- the Court tells all of us, "There is no
03:12:47PM 23 evidence as to the source of the information in the
03:12:50PM 24 affidavit or who prepared it." The Court puts us on
03:12:55PM 25 notice.

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03:12:57PM 1 And so for the last several weeks everyone has been
03:13:01PM 2 running around doing depositions, trying to get
03:13:03PM 3 information. We are not getting it. We get piecemeal
03:13:08PM 4 information. We issue subpoenas for metadata, so that
03:13:12PM 5 this way we can get to the bottom of it, because it is
03:13:14PM 6 clear that information is not forthcoming.

03:13:16PM 7 Yet, the two things that the Court referenced in its
03:13:20PM 8 order are not provided. Plaintiff provided no evidence as
03:13:24PM 9 to the source of the information. Plaintiff provided no
03:13:28PM 10 evidence as to who prepared the declaration. But we kind
03:13:33PM 11 of know who prepared the declaration, because before we
03:13:35PM 12 started today they cite RCW 5.60.060. What's the point of
03:13:45PM 13 that? Right? We know who prepared it. Why else would
03:13:49PM 14 they have that objection?

03:13:51PM 15 When I was asking Ms. Brown yesterday some questions
03:13:53PM 16 they objected because it might cause the witness to inform
03:14:01PM 17 the Court about conversations that they had with her. We
03:14:07PM 18 know who is giving the information. It is not Mr. Varney.

03:14:10PM 19 I won't belabor this, but this is -- Where did the
03:14:15PM 20 information come from? That was in the Court's order,
03:14:19PM 21 where did the information come from? It is obvious where
03:14:22PM 22 the information came from, because we know three weeks
03:14:24PM 23 before Varney signs that declaration -- we have a
03:14:31PM 24 document -- we have the plaintiffs' interrogatories
03:14:34PM 25 listing out places where he worked.

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03:14:38PM 1 It's clear in the interrogatories, which are verified
03:14:42PM 2 by the plaintiff himself, even though he signed under
03:14:46PM 3 Maria's spot, he says, "I believe my attorneys have
03:14:50PM 4 information suggesting."

03:14:52PM 5 Yet, three weeks later -- And, again, this is why
03:14:57PM 6 it's important to know when the statement was made. It
03:15:00PM 7 does not matter when the document was signed. It is when
03:15:04PM 8 the statement was made.

03:15:06PM 9 Because what we have here is -- If you keep telling
03:15:08PM 10 a witness about, "This is the information I have, this is
03:15:12PM 11 the information I have, this is the information I have,"
03:15:15PM 12 eventually it goes from three weeks ago "I believe my
03:15:19PM 13 attorneys have information," to now it is, "No, I have
03:15:21PM 14 personal knowledge." All of a sudden he has personal
03:15:24PM 15 knowledge.

03:15:25PM 16 His condition is significantly deteriorating, as
03:15:29PM 17 documented in the medical records. Yet, somehow what he
03:15:33PM 18 could not recall three weeks ago he now has personal
03:15:36PM 19 knowledge of.

03:15:40PM 20 And I won't go through -- This has already been
03:15:44PM 21 done, so I won't go through this. This is, again, the
03:15:47PM 22 similarities between the information that's in the
03:15:49PM 23 interrogatories three weeks earlier, and then all of a
03:15:52PM 24 sudden the information that he magically has personal
03:15:54PM 25 knowledge about, even though he is moments away --

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03:15:59PM 1 It's clear that this is not a statement by
03:16:12PM 2 Mr. Varney, that declaration. That was absolutely a
03:16:16PM 3 premeditated act by counsel. It was absolutely prepared
03:16:21PM 4 for litigation. And it was signed by Mr. Varney at a time
03:16:27PM 5 when he could not speak, he had been nonresponsive for
03:16:32PM 6 three to four days, and hadn't been out of his bed for
03:16:35PM 7 about three to four days.

03:16:37PM 8 And, again, going back to when were these statements
03:16:46PM 9 made. At the time that these statements were made -- And
03:16:50PM 10 I think that the evidence is clear that the statements
03:16:53PM 11 were never made by Mr. Varney, the statements were made by
03:16:56PM 12 his attorney. But at the time that these statements were
03:16:58PM 13 made back in December, there was no imminent death back
03:17:03PM 14 then.

03:17:04PM 15 And how do we know that? We know that from the email
03:17:07PM 16 chains. We know that from the testimony of Ms. Dawn
03:17:11PM 17 Brown, that he wanted to do this for his wife. We know
03:17:14PM 18 that at the time that the statements were being uttered he
03:17:18PM 19 was planning to make these statements at some future time.
03:17:22PM 20 And then it progressed over time. This is how over the
03:17:27PM 21 course of three weeks he eventually has personal knowledge
03:17:30PM 22 of the things he never knew before.

03:17:32PM 23 Even when you look at the declaration itself there is
03:17:38PM 24 no specificity. It is just opinion and conclusions.
03:17:44PM 25 There is no -- He will mention a product, but he doesn't

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03:17:48PM 1 tell us what he did with that product. He doesn't tell
03:17:51PM 2 us -- He worked at a shipyard. He doesn't tell us on
03:17:55PM 3 what -- We are entitled to know this. "Well, what ship
03:17:59PM 4 did you see Foster Wheeler boilers on? Did you personally
03:18:02PM 5 do that work or did somebody else do that work? What kind
03:18:05PM 6 of work was being done? Was it firesides? Was it
03:18:08PM 7 watersides? Were you working on the burners? What were
03:18:12PM 8 you doing?"

03:18:13PM 9 An interesting thing -- These records aren't before
03:18:16PM 10 the Court, unfortunately. But Ms. Brown mentioned
03:18:21PM 11 yesterday something about periscopes, that she thought he
03:18:24PM 12 worked on periscopes. In fact, when we see his military
03:18:27PM 13 records, he is actually working on optical gauges. He is
03:18:32PM 14 in the shipyard working on the optical gauges, not on the
03:18:35PM 15 actual equipment. Again, we didn't have the opportunity
03:18:37PM 16 to cross him. Nor will we ever have an opportunity to
03:18:41PM 17 cross-examine these plaintiffs if we allow this to happen
03:18:44PM 18 in this court, because it will spread throughout the
03:18:47PM 19 country.

03:18:47PM 20 Your Honor, this evidence has shown the statements on
03:18:59PM 21 there were not spontaneous. Counsel referenced, "Oh, this
03:19:04PM 22 is not an excited utterance." It is the same concept, the
03:19:08PM 23 same principal. That is why it is listed as one of the
03:19:11PM 24 twelve factors in the residual exception, because that is
03:19:14PM 25 a way that you gauge the truthfulness of a statement.

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03:19:17PM 1 And, of course, counsel took a little bit --
03:19:21PM 2 addressed this. But that is exactly what this was. It
03:19:25PM 3 was absolutely orchestrated. That is exactly why they had
03:19:29PM 4 the priest there, and they had the notary there.

03:19:31PM 5 Here we have the information -- I won't go through
03:19:36PM 6 this. This has already been done.

03:19:47PM 7 And this here, your Honor -- If you will indulge me
03:19:51PM 8 for a moment on this, this is kind of why we were -- we
03:19:57PM 9 were so much after the metadata. And this is a really
03:20:01PM 10 important issue here. So with a dying declaration there
03:20:08PM 11 is an immediacy about it. Here, the very fact that
03:20:14PM 12 plaintiffs' counsel raised attorney work product, Judge,
03:20:21PM 13 that's -- Sorry, your Honor. This is an awesome
03:20:26PM 14 admission. How can it be the dying declaration of
03:20:31PM 15 Mr. Varney if it's attorney work product? They just
03:20:37PM 16 admitted the entire thing, your Honor. This was attorney
03:20:42PM 17 work product.

03:20:43PM 18 If it's attorney work product, which they have
03:20:46PM 19 alleged in this court several times, and the documents
03:20:50PM 20 when they refused to turn over the metadata, which we
03:20:53PM 21 absolutely believe we are entitled to, then it is -- this
03:20:57PM 22 is their document. This is no more than just answers to
03:21:03PM 23 interrogatories. This is not a dying declaration.

03:21:07PM 24 At every step Mr. Varney's declaration lacks the
03:21:14PM 25 spontaneity that is the hallmark of the dying declaration.

03:21:19PM 1 This document has no guarantee of trustworthiness, as we
03:21:23PM 2 have seen.

03:21:23PM 3 And Mr. Varney's declaration, we are asking this
03:21:27PM 4 Court to hold it inadmissible for all purposes, other than
03:21:31PM 5 for defendants to prove up shares if they make it past
03:21:35PM 6 summary judgment. And it cannot be relied upon by
03:21:38PM 7 Dr. Maddox. Thank you.

03:21:40PM 8 THE COURT: Thank you, counsel. Any other --

03:21:42PM 9 MR. CRAIG: Your Honor, very briefly. May I
03:21:53PM 10 proceed? Kevin Craig, your Honor. Just very briefly.

03:21:59PM 11 Plaintiffs brought up the Pisano case out of Rhode
03:22:04PM 12 Island. The Rhode Island rule is substantially different
03:22:06PM 13 than the federal rule. In Rhode Island the courts have
03:22:09PM 14 ruled in terminal illness cases it is not necessary to
03:22:12PM 15 apprehend immediate death. So I think that case would not
03:22:15PM 16 apply here, because the federal rule does require that.

03:22:19PM 17 Regarding Dr. Kercheval's note and testimony that on
03:22:29PM 18 February 5th Mr. Varney did not have the cognitive ability
03:22:34PM 19 to contribute to discussions regarding his care at the
03:22:39PM 20 hospital, plaintiffs have brought up the fact that on the
03:22:43PM 21 morning that he signed the declaration he is able to
03:22:45PM 22 respond to simple commands, you know. I want to point out
03:22:50PM 23 to the Court, there is a big gulf between being able to
03:22:53PM 24 follow simple commands like blinking your eyes or opening
03:22:56PM 25 your eyes and having the cognitive ability to contribute

03:23:00PM 1 to your healthcare decisions or be able to give testimony
03:23:05PM 2 under oath in a court of law.

03:23:08PM 3 I think the plaintiffs -- On the issue of him
03:23:14PM 4 knowing that death was imminent, there is a bit of a
03:23:19PM 5 Catch-22 for plaintiffs here, because we have the
03:23:21PM 6 testimony that he was in bad shape before, but then
03:23:25PM 7 suddenly when his declaration is going to be signed, he
03:23:30PM 8 rallies, sits up, and signs the declaration.

03:23:35PM 9 I think at that point you have a hard time saying at
03:23:38PM 10 that particular moment he knew that his death wasn't going
03:23:42PM 11 to be delayed. Apparently he was stronger then. He was
03:23:46PM 12 able to respond better.

03:23:48PM 13 I mean, the rule is designed to be you are at death's
03:23:53PM 14 door. Here we have evidence that he is suddenly better,
03:23:56PM 15 if only temporarily. I don't think you can construe that
03:24:00PM 16 to mean that he knew that he was dying at that moment.

03:24:04PM 17 Very lastly, since this is regarding the
03:24:09PM 18 admissibility of the evidence, we do assert an objection
03:24:11PM 19 under Rule 403, the admission of the declaration and the
03:24:18PM 20 portions of the declaration in the doctor's report as
03:24:22PM 21 highly prejudicial.

03:24:26PM 22 You asked why this matters to you. Well, if you have
03:24:28PM 23 a system where the plaintiffs only need to come up with a
03:24:30PM 24 declaration that the defendants were not privy to before,
03:24:33PM 25 have no opportunity to cross-examine, the jury and the

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03:24:38PM 1 court lose the ability to view the witness provide the
03:24:43PM 2 testimony, and there is no opportunity to evaluate
03:24:46PM 3 credibility or the competency of the witness. So we would
03:24:48PM 4 ask that it be excluded under Rule 403, in addition to the
03:24:52PM 5 reasons already cited. Thank you, your Honor.

03:24:55PM 6 THE COURT: Anyone else from the defense? All
03:24:58PM 7 right.

03:25:01PM 8 MR. ADAMS: Quickly, your Honor. Your Honor, we
03:25:06PM 9 just heard a little over an hour and a half of argument
03:25:11PM 10 from some very skilled trial lawyers. They are very
03:25:16PM 11 skilled trial lawyers. They are first chair trial
03:25:18PM 12 lawyers, and I have seen them in trial before.

03:25:20PM 13 Almost all of the arguments went to the weight of the
03:25:24PM 14 evidence if it is -- once admitted. They have very strong
03:25:31PM 15 arguments to make to a jury about the credibility, the
03:25:35PM 16 conspiracy, the staging of the event. All of these
03:25:42PM 17 arguments are strong arguments to be made to a jury.

03:25:48PM 18 But we are here about ER 804(b)(2). That is what
03:25:54PM 19 this hearing is about. And there was very little mention
03:25:57PM 20 of that statute.

03:26:00PM 21 What they did mention is all of these other elements
03:26:06PM 22 that aren't in ER 804(b)(2). And so what they invited the
03:26:11PM 23 Court to do was create new law.

03:26:14PM 24 They said there cannot be a motive when the person
03:26:18PM 25 signs the dying declaration. When a person is shot and

03:26:22PM 1 murdered, and with their last breath they say, "John Smith
03:26:26PM 2 killed me," does that person not have a motive that John
03:26:30PM 3 Smith will be convicted of their murder? There is always
03:26:33PM 4 a motive.

03:26:34PM 5 So that was just an element, not in ER 804(b)(2),
03:26:42PM 6 that the lawyers asked and invited the Court to create.
03:26:45PM 7 It is just not there.

03:26:46PM 8 There was the argument about Don Varney didn't say it
03:26:53PM 9 for the first time upon his death. He said it in the
03:26:58PM 10 medical records. He said it to his kids. He said it all
03:27:01PM 11 these other times. That is not an element of ER
03:27:05PM 12 804(b)(2). It is just not there.

03:27:07PM 13 There was the argument that the witnesses didn't come
03:27:10PM 14 live to the evidentiary hearing. That is not an element
03:27:13PM 15 in the dying declaration statute.

03:27:14PM 16 There was the argument that it wasn't videotaped.
03:27:17PM 17 That is not an element in the dying declaration statute.

03:27:20PM 18 There was the argument that Dawn Brown's credibility
03:27:25PM 19 about what she saw and what Mr. Varney said at the time
03:27:29PM 20 was in question. Well, she is the fifth witness that was
03:27:32PM 21 there. There is nothing in the dying declaration statute
03:27:35PM 22 that says you have to have five witnesses for a dying
03:27:38PM 23 declaration. So even if the Court believed and
03:27:40PM 24 discredited Ms. Brown entirely, which I don't think the
03:27:45PM 25 Court should do, that has nothing to do with ER 804(b)(2).

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03:27:51PM 1 There was the argument that it cannot have anything
03:27:57PM 2 to do with attorney work product. I showed your Honor the
03:28:06PM 3 Supreme Court case from Washington state where the
03:28:07PM 4 prosecutor prepared the declaration, the witness signed
03:28:10PM 5 it, and they convicted someone of first-degree murder
03:28:13PM 6 under the highest burden in law, with the highest burden
03:28:17PM 7 of proof, with the most serious consequences. It was
03:28:20PM 8 admitted. And a prosecutor prepared it. So that element
03:28:23PM 9 about attorneys cannot have anything to do with it, it is
03:28:25PM 10 just not there.

03:28:26PM 11 There was all of this testimony about four days
03:28:33PM 12 before Mr. Varney died he never said a word, and he never
03:28:38PM 13 said a word in the room, and he couldn't speak, and there
03:28:41PM 14 was all that argument about that. That came from Gloria's
03:28:45PM 15 deposition testimony. Mrs. Varney's deposition testimony
03:28:49PM 16 was the basis for that entire argument that Mr. Varney
03:28:53PM 17 could not speak, and so Mrs. Brown -- Ms. Brown's
03:28:56PM 18 testimony should be disbelieved, the priest's declaration
03:29:00PM 19 should be disbelieved.

03:29:04PM 20 Here is what Mrs. Varney actually said: "It was in
03:29:09PM 21 the hospital. He was laying back in his bed, and he asked
03:29:14PM 22 for them to raise the bed so that he was sitting up
03:29:19PM 23 straight." And so even in Gloria Varney's testimony about
03:29:33PM 24 what happened, which is what the defense relied upon, she
03:29:37PM 25 said Mr. Varney spoke and asked that the bed be lifted up

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03:29:40PM 1 when the declaration was presented to him.

03:29:43PM 2 Mrs. Varney's second language is English. The entire
03:29:49PM 3 deposition was translated. But she said right here he
03:29:53PM 4 spoke when they came in the room.

03:29:56PM 5 And then later she said, "The last word he said to me
03:30:01PM 6 was 'I love you'." Not the last word he spoke. You keep
03:30:07PM 7 hearing argument that the last word he spoke was that he
03:30:10PM 8 loved his wife, and that was before he signed the
03:30:14PM 9 declaration. That is the last word he spoke to her.

03:30:17PM 10 There was this argument about the metadata, which the
03:30:29PM 11 Court already ruled on, which they didn't seek until two
03:30:32PM 12 days before they demanded that it be produced.

03:30:35PM 13 There was this repeated suggestion that our assertion
03:30:38PM 14 of the attorney-client privilege was improper. Your
03:30:42PM 15 Honor, I would submit to you that is just an improper
03:30:45PM 16 argument for the Court to consider. It is not our
03:30:49PM 17 decision as lawyers to waive the attorney-client
03:30:52PM 18 privilege. The law says we may not make that decision.
03:30:54PM 19 We do not hold the privilege. It's not ours. It's the
03:30:58PM 20 client's privilege. And so to somehow be dinged or
03:31:05PM 21 diminished because we didn't waive the attorney-client
03:31:08PM 22 privilege is just an improper argument.

03:31:10PM 23 But the metadata issue, if your Honor looks at the
03:31:15PM 24 emails, Exhibit 20, which is in evidence, it's going to
03:31:19PM 25 tell you what the metadata would have shown. Because all

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03:31:22PM 1 of those emails are me desperately trying to get this
03:31:27PM 2 deposition going, and the defense resisting the
03:31:33PM 3 deposition, demanding 18 hours for cross-examination, even
03:31:36PM 4 though the federal rules limit it to seven, delaying the
03:31:40PM 5 deposition, saying they won't start questioning at the
03:31:43PM 6 deposition until the week after I ask my questions. I am
03:31:46PM 7 so desperate I tell them, "I will limit my questioning to
03:31:49PM 8 one hour," because this witness is so sick, and we are
03:31:52PM 9 trying to preserve his testimony, and we've got the
03:31:55PM 10 videographer, and we are setting up a live feed from the
03:31:59PM 11 hospital to get his deposition done.

03:32:02PM 12 If their theory of the case were true, that entire
03:32:06PM 13 time I am preparing a declaration to secretly have him
03:32:11PM 14 sign, to cancel the deposition, and it is already ahead of
03:32:17PM 15 time.

03:32:17PM 16 What they have asked you to do, your Honor, is to
03:32:21PM 17 believe the biggest conspiracy imaginable, to enter a
03:32:25PM 18 fantasy land where every witness is on the take from me, I
03:32:30PM 19 am secretly preparing a declaration long before, I am
03:32:35PM 20 calling videographers, I am setting up a live video feed,
03:32:40PM 21 and I have bought off every witness. And the whole time I
03:32:43PM 22 am secretly Machiavellianly planning to cancel the whole
03:32:49PM 23 thing and have him sign the declaration.

03:32:52PM 24 And I secretly bring all these witnesses, not because
03:32:55PM 25 they are disinterested witnesses who can observe what

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03:32:58PM 1 happened and then come testify and say, "This is what
03:33:02PM 2 happened," but because they are all on the take with
03:33:05PM 3 hundred dollar bills.

03:33:06PM 4 And every one of them lied under oath, the priest,
03:33:13PM 5 the notary, the family, the nurses, Sharma -- Dr. Sharma.
03:33:19PM 6 The Court should decline their invitation to enter fantasy
03:33:26PM 7 conspiracy land.

03:33:27PM 8 Quickly, your Honor, the consistency as a weakness
03:33:53PM 9 argument was again raised. It was the vast majority of
03:33:56PM 10 Ms. Weglarz's closing argument. "Mr. Varney said this so
03:34:03PM 11 many times before the declaration, and so it wasn't a
03:34:09PM 12 statement when he made it the last time with belief of
03:34:13PM 13 imminent death." I think that was the argument.

03:34:17PM 14 And then the order the Court sent out advising the
03:34:22PM 15 parties what the Court wanted to know was presented. The
03:34:26PM 16 Court wanted to know who -- where did this information in
03:34:31PM 17 the declaration come from. The charge against plaintiffs
03:34:35PM 18 was I hadn't taken the stand and provided that direct
03:34:38PM 19 testimony.

03:34:41PM 20 First of all, I cannot waive the attorney-client
03:34:46PM 21 privilege. And the idea that presenting a declaration to
03:34:51PM 22 the other side waives the attorney-client privilege, then
03:34:54PM 23 every lawyer in this room waives the attorney-client
03:34:56PM 24 privilege every time they file a summary judgment motion
03:34:59PM 25 and attach a declaration from their corporate

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03:35:02PM 1 representative, or a witness, which they do -- which every
03:35:06PM 2 lawyer in here does pretty much in every case. That is
03:35:09PM 3 not the law, and there was no citation to the law.

03:35:11PM 4 There is circumstantial evidence of where the
03:35:25PM 5 information in the declaration came from. Even though
03:35:27PM 6 there is not the direct evidence from me, there is very
03:35:30PM 7 strong circumstantial evidence.

03:35:32PM 8 And that circumstantial evidence is the fact that
03:35:36PM 9 Mr. Varney said, "I was exposed to asbestos in the
03:35:40PM 10 shipyards." He said it in his medical records. He said
03:35:43PM 11 it to his family. He said it to his daughters. He said
03:35:47PM 12 it to his wife. He said it to his doctors. He said it in
03:35:50PM 13 the declaration.

03:35:53PM 14 And so the most reasonable inference to make from all
03:35:56PM 15 of those other statements that we know Mr. Varney made is
03:36:03PM 16 that he made the same statements in the declaration.

03:36:06PM 17 I don't know if I made that point clearly. But the
03:36:09PM 18 circumstantial inferences are since he said it everywhere
03:36:12PM 19 else, he probably said it in the declaration with his
03:36:15PM 20 signature on it, his name on it, that he said -- that
03:36:21PM 21 eight witnesses have said he made.

03:36:34PM 22 There was the last thing -- And I will end with
03:36:39PM 23 this, your Honor, because I know it has been long. There
03:36:42PM 24 was the argument that the sky will fall if the Court finds
03:36:47PM 25 that this meets the dying declaration elements.

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03:36:51PM 1 First of all, the law is the law. The law is about
03:36:56PM 2 as settled in this area as the law can ever be. For 110
03:37:02PM 3 years the Washington State Supreme Court has said this is
03:37:06PM 4 the law and these are the elements.

03:37:10PM 5 And the invitation to change the law, and add more
03:37:13PM 6 elements, and to weigh the policies, and to do all of
03:37:16PM 7 these external things out of the statute -- If that were
03:37:19PM 8 the case, the legislature would have changed it.

03:37:22PM 9 But here is why -- Even if the Court is going to
03:37:25PM 10 consider these arguments that asbestos litigation will be
03:37:31PM 11 declarations from here on out, first of all, the Pisano
03:37:35PM 12 case was not my firm. That was plucked out of thin air.
03:37:39PM 13 That was not my firm. My firm -- I don't even think my
03:37:42PM 14 firm existed when the Pisano case came out. Maybe it did.
03:37:46PM 15 Mine is a relatively new firm. It was not my case. We
03:37:50PM 16 had nothing to do with it. This isn't a pattern and
03:37:53PM 17 practice. That was just made up.

03:37:55PM 18 But take a look at the emails, Exhibit 20, your
03:37:58PM 19 Honor. I know it wasn't the focus of the hearing. What
03:38:01PM 20 happens in these cases is that the plaintiffs' lawyers are
03:38:08PM 21 desperate to complete the deposition. Desperate. And
03:38:12PM 22 they really have -- they are forced to give up basically
03:38:19PM 23 everything to get the deposition done before their client
03:38:21PM 24 dies.

03:38:22PM 25 Not every lawyer, but there is an incentive from the

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03:38:26PM 1 defense bar -- I will say it this way: If the client
03:38:32PM 2 dies and is never heard from, one party's case gets
03:38:38PM 3 better, and not the other. If the deposition is
03:38:40PM 4 completed, the client is heard from, another party's case
03:38:44PM 5 gets better. And so there are certain incentives that are
03:38:49PM 6 just a fact and reality of life on each side of the
03:38:52PM 7 litigation.

03:38:53PM 8 The incentive for the plaintiffs is to desperately
03:38:56PM 9 get the dying person's deposition done as soon as
03:38:59PM 10 possible. If you read those emails, your Honor, that is
03:39:01PM 11 what I am trying to do. I gave up the farm. I said, "One
03:39:05PM 12 hour. Please. I will give you 18 hours, whatever you
03:39:07PM 13 want. Here is all the documents that we have. Here is
03:39:10PM 14 everything we have. Can we please get this person's
03:39:12PM 15 deposition done before he dies?" And they said, "No. No.
03:39:16PM 16 No. Eighteen hours. Maybe next week." They put it off
03:39:19PM 17 from the 7th to the 8th.

03:39:23PM 18 If we are going to consider the policy, this gives
03:39:26PM 19 them an incentive to get the deposition done, too. I
03:39:31PM 20 don't even think the Court should consider it, but it
03:39:33PM 21 gives them a small incentive to get the deposition done
03:39:37PM 22 quickly.

03:39:37PM 23 There was this idea that we delayed, that the initial
03:39:41PM 24 disclosures didn't disclose Mr. Varney's declaration until
03:39:47PM 25 June of 2018. I don't think the initial disclosures were

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03:39:52PM 1 in evidence. I haven't even looked at them. I'm sure his
03:39:55PM 2 name is in there.

03:39:58PM 3 But there was the argument that the witnesses'
03:40:02PM 4 memories have faded and we somehow deprived the defense --
03:40:06PM 5 this is my last point -- we somehow deprived the defense
03:40:10PM 6 of the opportunity to question these witnesses before
03:40:12PM 7 their memories dissipated. And there is some superficial
03:40:15PM 8 appeal to that argument. Obviously, the law understands
03:40:17PM 9 as time passes witnesses' memories dissipate.

03:40:21PM 10 The problem is, after we served the declaration and
03:40:24PM 11 we disclosed the declaration in discovery, the defense
03:40:28PM 12 didn't depose a single witness for six months. And it was
03:40:33PM 13 Dr. Kercheval. It wasn't even one of the witnesses in the
03:40:35PM 14 room. They didn't even depose Mrs. Varney until February
03:40:41PM 15 of 2019, over a year after -- over eight months after we
03:40:45PM 16 gave them the declaration.

03:40:47PM 17 So this notion that we have somehow robbed them of
03:40:50PM 18 the opportunity is not supported. They never deposed the
03:40:54PM 19 priest. They never deposed the notary. We did. And so
03:40:58PM 20 this notion that we have stolen from them the opportunity
03:41:00PM 21 to get the truth from these witnesses is just not reality.

03:41:04PM 22 Your Honor, all of the witnesses and all of the
03:41:09PM 23 medical records support our version of the case. I urge
03:41:15PM 24 the Court not to enter the fantasy land where this was one
03:41:18PM 25 of the biggest and most unimaginable conspiracies ever,

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03:41:24PM 1 where I paid everyone to tell a lie. Thank you so much.

03:41:30PM 2 MS. JOHNSON: Your Honor, if I could? Obviously
03:41:33PM 3 we didn't make --

4 THE COURT: I'm sorry.

03:41:35PM 5 MS. JOHNSON: Obviously we didn't make any
03:41:36PM 6 objections during closing argument, because there is no
03:41:39PM 7 need to make evidentiary objections during a closing
03:41:42PM 8 argument to your Honor. Just for the purposes of the
03:41:45PM 9 record, the last two cases that counsel cited to here
03:41:51PM 10 today were not included in their briefing before this
03:41:55PM 11 Court. All the parties have submitted substantial
03:41:59PM 12 briefing with respect to this -- the issues before the
03:42:02PM 13 Court today, and those two cases that were cited by
03:42:06PM 14 counsel -- The Pisano case was included. The other two
03:42:11PM 15 cases were not included.

03:42:14PM 16 THE COURT: I understand. Well, it is 20 to
03:42:19PM 17 4:00. It is my habit, a long-standing habit, to make oral
03:42:24PM 18 findings and conclusions under Rule 52. I will be ready
03:42:32PM 19 to do that like at 10:30 in the morning. If you want to
03:42:38PM 20 hear the result, you can show up. If you don't want to
03:42:41PM 21 hear the result, it will be on the record.

22 (Proceedings recessed.)
23
24
25

C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the
United States District Court, Western District of
Washington, certify that the foregoing is a true and
correct transcript from the record of proceedings in the
above-entitled matter.

/s/ Barry Fanning
Barry Fanning, Court Reporter